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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-788

ARMOUR AND COMPANY, *Petitioner,*

v.

LOCAL UNION NO. 186, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, AN UNINCORPORATED LABOR CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LESTER S. HYMAN
PETER BARNES
LOIS J. SCHIFFER
815 Connecticut Ave., N.W.
Washington, D.C. 20006
Telephone: (202) 298-8020

ROBERT J. BERNARD
NORBERT E. ANDERSON
WALTER B. CONNOLLY, JR.
Greyhound Tower
Phoenix, Arizona 85077
Telephone: (602) 248-4000

Attorneys for Petitioner

Of Counsel:

LEVA, HAWES, SYMINGTON,
MARTIN & OPPENHEIMER

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ARMOUR AND COMPANY, *Petitioner,*

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LOCAL UNION NO. 186, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, AN UNINCORPORATED LABOR CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Armour and Company, respectfully prays that a writ of certiorari issue to review the judgment rendered herein on August 17, 1971, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, which is reported at 446 F.2d 610 (6th Cir. 1971), appears as Appendix A to this Petition. The memorandum and opinion of the United States District Court for the Eastern District

of Tennessee, Southern Division, granting summary judgment for Petitioner, which is unofficially reported at 78 L.R.R.M. 2054 (1971), appears as Appendix B to this Petition. The opinion of the United States District Court for the Eastern District of Tennessee, Southern Division, denying reconsideration of its prior opinion, which is unofficially reported at 78 L.R.R.M. 2060 (1971), appears as Appendix C to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 17, 1971. A timely petition for reconsideration was denied on September 15, 1971, and this Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Does an employer become liable to pay its employees full vacation pay to which they are not entitled under the terms of the applicable collective bargaining agreement simply because the employer, in good faith and for *bona fide* business reasons, closes the plant at which the employees were formerly employed?

II. Is it proper, in construing a collective bargaining agreement between a national employer and a local union, (A) to apply "general rules of contract law," (B) to look only to the specific language in question, and (C) to ignore the relevant industry's practice, usage and custom in identical situations?

III. Should this Court, as the final arbiter of the substantive rules of federal labor law, resolve an exist-

ing and irreconcilable conflict among lower courts and labor arbitrators as to the proper construction of vacation eligibility provisions which are identical with, or closely analogous to, the vacation eligibility provision contained in the collective bargaining agreement here in issue?

IV. Does the decision of the Sixth Circuit deny Petitioner due process of law (A) in treating as dispositive a disputed factual issue which the District Court, in granting summary judgment to Petitioner, deemed immaterial as a matter of law and (B) in making a "finding" as to that issue rather than remanding the matter to the District Court for a full hearing to resolve an existing conflict in the evidence as to the issue?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal constitutional provision involved is the Due Process Clause of the Fifth Amendment to the Constitution of the United States, which appears as Appendix D to this Petition.

The following Federal statutes and Federal Rules of Civil Procedure are involved: 29 U.S.C. § 185(a); Fed. Rules Civ. Proc. rule 56, 28 U.S.C. The pertinent portions of these provisions appear as Appendix E to this Petition.

STATEMENT OF THE CASE

Petitioner, Armour and Company, seeks review of the ruling below which, if allowed to stand, will impose a novel and unwarranted burden on the previously unquestioned right of an employer, in good faith and for *bona fide* business reasons to close one of its

plants and will erode fundamental principles established by prior decisions of this Court regarding proper standards to be followed in construing collective bargaining agreements.

Petitioner further seeks review of the ruling below by this Court as the final arbiter of the substantive rules of federal labor law which ultimately govern the proper construction of collective bargaining agreements. Specifically it asks this Court to resolve an existing and irreconcilable conflict between lower courts, both federal and state, as well as labor arbitrators, as to whether identical, or closely analogous, vacation eligibility clauses should be construed as requiring employment on a specified date as a condition precedent to vacation pay.

Finally, Petitioner seeks review of the ruling below which denied the basic right of a party litigant to have his day in court on disputed and material factual issues.

Although each of these issues arose during the course of the proceedings below, each was raised in a different manner and at different times. It is necessary, therefore, to describe the history of the proceedings below in some detail.

I. THE INITIAL PROCEEDINGS BEFORE THE DISTRICT COURT.

This litigation was commenced on August 22, 1969, when Respondent, Local Union No. 186, United Packinghouse, Food and Allied Workers, AFL-CIO, filed a complaint against Petitioner in the United States District Court for the Eastern District of Tennessee, Southern Division.

Respondent's complaint alleged that Petitioner had breached a collective bargaining agreement by refusing

to pay Respondent's members vacation pay for calendar year 1967. Petitioner filed an answer denying that it was obligated under the terms of the agreement to make such a payment. The District Court had jurisdiction over the matter under Section 301(a) of the Labor Management Relations Act, as amended. (29 U.S.C. § 185(a)).

Both parties moved for summary judgment, and each party submitted one or more affidavits in support of its motion. At this point, the material facts before the District Court were as follows:

A. The Closing of the Lookout Plant.

Prior to September, 1966, Petitioner, through one of its divisions, the Lookout Oil & Refining Company, had operated a plant in Chattanooga, Tennessee (the "Lookout Plant"). Since at least 1956, Respondent had acted as the exclusive bargaining representative of Petitioner's production and maintenance employees at the Lookout Plant.

In September, 1966, Petitioner, in good faith and for *bona fide* business reasons, terminated its operations in Chattanooga and sold the Lookout Plant. As a consequence, all of Respondent's members were permanently discharged as of September 18, 1966.

After the closing, Petitioner paid its former employees full severance pay and full vacation pay for 1966, the calendar year in which the Lookout Plant was closed. Respondent, however, demanded that Petitioner also pay its former employees full vacation pay for 1967, the calendar year following the closing of the Lookout Plant. Petitioner refused this demand

and, when limited arbitration failed to resolve the issue, Respondent brought suit.

B. The Vacation Provisions in the Lookout Agreement.

At the time of the closing of the Lookout Plant, there was a collective bargaining agreement between Petitioner and Respondent covering the period September 18, 1964 through September 17, 1967 (the "Lookout Agreement"). The dispute which led to the suit involved the interpretation of the vacation eligibility provisions of Section XI (Vacations) of the Lookout Agreement which provided, in pertinent part, that:

> "(a) Vacations for all employees will be granted on a calendar year basis in accordance with the following eligibility requirements.
>
> "(1) Employees who have one (1) or more years continuous service as of January 1 . . . will be granted vacations during the calendar year January 1 to December 31, provided they have worked a minimum of one hundred fifty (150) days during the preceding calendar year." *

C. The Source and History of the Vacation Pay Provisions in the Lookout Agreement.

1. *In general.* As a matter of general practice, Petitioner negotiated a Master Agreement with the United Packinghouse, Food and Allied Workers, AFL-

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* All of the provisions of Section XI of the Lookout Agreement are set out at page 103a, *et seq.* of the Joint Appendix ("Jt. App.") which was part of the record before the Sixth Circuit below and which has been included in the record filed with this Court. The portions of Section XI quoted in the text are in Paragraph 50(a)(1), Jt. App., p. 104a. The vacation provisions in Section XI of the Lookout Agreement also contained a specific exception for "new employees." This exception is here irrelevant.

CIO (the "International")* governing the terms and conditions of employment at its larger meat-processing plants. The Master Agreement would then be used as a guide in negotiating separate collective bargaining agreements covering individual plants, such as the Lookout Plant, and often clauses in the Master Agreement would be incorporated *verbatim* into the latter agreements. (Jt. App., p. 13a) This general practice was followed with respect to the vacation provisions in the collective bargaining agreements between Petitioner and Respondent which were taken from the Master Agreements between Petitioner and the International. (Jt. App., pp. 13a-14a.)

2. *Prior to September, 1959.* Prior to September, 1959, the vacation pay provisions (both in the Master Agreement and in the Lookout Agreement) required Petitioner's employees, in order to be eligible for paid vacations, to work a certain number of days during the annual period prior to the vacation year and to be employed on the first day of the vacation year. (Jt. App., p. 14a.)

Prior to September, 1959, however, the vacation year did not commence for all employees on January 1 but, instead, commenced for each employee on his own individual "anniversary" date, *i.e.*, on the annual anniversary of the date on which he acquired seniority. (Jt. App., p. 14a.)

Since, therefore, there were numerous eligibility dates for vacation purposes (corresponding to the

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* The record shows that sometime after September, 1959, the International merged with the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. (Jt. App., pp. 40a-41a.) The term "International" shall include the latter named union.

number of employees' "anniversary" dates) it was not possible prior to September, 1959 to specify a single eligibility date for vacation purposes in the Master Agreement or the Lookout Agreement.

3. *From and after September, 1959.* Commencing with the September, 1959 Master Agreement, however, vacations for all employees were put on the uniform basis of a calendar year. (Jt. App., pp. 14a-15a.) This made it possible, for the first time, to specify an eligibility date—January 1—for vacation purposes in the pertinent vacation provisions. Although one of Petitioner's purposes in obtaining this change was to standardize vacations for all of its employees (Jt. App., p. 14a), this change was *not* intended by Petitioner to eliminate the already existing condition that employees had to be employed on a specific eligibility date to qualify for a paid vacation. That is, prior to September, 1959, each employee's "anniversary" date was his specific eligibility date for vacation purposes; from and after September, 1959, January 1 became *the* eligibility (or "anniversary") date for all employees for vacation purposes. (Jt. App. pp. 14a-15a.)

The September, 1959 Master Agreement was amended to reflect this change by including therein language which was identical to the language of Paragraph 50(a)(1) of the Lookout Agreement at the time of the closing of the Lookout Plant. (See, p. 6, *supra.*) Thereafter, the Lookout Agreement was also amended to incorporate that same language in its vacation provisions. This amendment of the Lookout Agreement was made at *Respondent's* request in order to obtain for Respondent's members the same treatment for vacation purposes as was accorded the Interna-

tional's members under the Master Agreement. (Jt. App., p. 14a.) And the language of the vacation provision remained unchanged in both the Master Agreement and the Lookout Agreement from and after September, 1959. (Jt. App., pp. 13a-14a.)

D. The Practice, Usage and Custom With Respect to the Payment of Vacation Pay for a Calendar Year Following a Plant Closing Under the Identical Vacation Pay Provisions of the Master Agreement and the Lookout Agreement.

1. *The practice, usage and custom of Petitioner and the International under the Master Agreement.* Petitioner closed a number of its plants from and after September, 1959, all of which, at the time of closing were subject to the vacation pay provisions contained in the Master Agreement which, in turn, were identical to those contained in the Lookout Agreement. In each such instance, the plants were closed during a calendar year—*i.e.*, prior to January 1—and in each instance Petitioner paid those of its former employees (who had worked at least 150 days during the calendar year in which the plant was closed) vacation pay for the year of closing.

In each such instance, Petitioner did not pay its former employees vacation pay for the calendar year commencing *after* the year of closing on the ground that the language of the vacation eligibility provision required them to be employed as of January 1 of that year in order to qualify for vacation pay for that year. And, in each such instance, the International did not object to Petitioner's construction and administration of the vacation eligibility provision. (Jt. App., pp. 15a, 39a-42a.)

2. *The practice, usage and custom of Petitioner and Respondent under the Lookout Agreement.* Since the

Lookout Plant was closed but once, there was no analogous practice, usage and custom with respect to the Lookout Plant. (Jt. App., p. 74a.)

On the basis of the foregoing record, Respondent argued to the District Court that all but one of its members were entitled to vacation pay for 1967 merely because they had worked at least 150 days in 1966. Petitioner argued that Respondent's members were not entitled to vacation pay for 1967 because none of them had been employed as of January 1, 1967 as required by the terms of the Lookout Agreement.

The District Court ruled that the language of the basic eligibility provision in the Lookout Agreement appeared to be clear and unambiguous and that it required employment on January 1, 1967 as a condition precedent to eligibility for full vacation pay for 1967. (App. B, p. 23a). The District Court then granted Petitioner's motion for summary judgment and dismissed Respondent's complaint.

H. THE SUBSEQUENT PROCEEDINGS BEFORE THE DISTRICT COURT.

Respondent filed a motion with the District Court requesting reconsideration and filed a supplementary affidavit in support of its motion. Although the allegations of this affidavit were not entirely clear, they could be read as denying that the Lookout Agreement was based on the Master Agreement (Jt. App., p. 95a) and asserting that the purpose of amending the vacation provisions of the Lookout Agreement in September, 1959, was solely to suit Petitioner's administrative convenience. (Jt. App., p. 97a.)

Read in this way, these allegations contravened the allegations contained in Petitioner's prior affidavits

to the effect that the vacation provisions of the Lookout Agreement had been expressly based on, and drawn from, the Master Agreement (Jt. App., p. 14a) and that the purpose of the September, 1959 amendment to the Lookout Agreement had been mainly to maintain a pre-existing requirement of employment on a specific eligibility date as well as to obtain, at Respondent's request, the same vacation treatment for Respondent's members as had been granted to the International's members under the Master Agreement. (Jt. App., pp. 14a-15a.)

The District Court reconsidered the record and affirmed its prior ruling. The District Court pointed out that its prior decision had been "primarily based upon the contract language as agreed to by the parties" and further noted that past practices provided at most a guideline to the meaning of this language. (App. C, p. 26a.)

The District Court, in short, affirmed its prior decision on the ground that any dispute as to whether the vacation pay provisions in the Lookout Agreement had been specifically drawn from the Master Agreement or as to the purpose of amending those provisions in September, 1959, was not material, as a matter of law, to the proper construction of the terms of the Lookout Agreement. Respondent appealed the District Court's opinion to the United States Court of Appeals for the Sixth Circuit.

III. THE SIXTH CIRCUIT'S OPINION.

The Sixth Circuit reversed the District Court and held, first, that "the January 1 date was not a sine qua non for eligibility for vacation" (App. A, p. 6a) and, second, that although the Lookout Agreement could be

construed as conditioning the rights of certain of Respondent's members to vacation pay upon their being employed upon a date subsequent to the closing of the Lookout Plant, Petitioner's "unilateral action in closing down the plant" eliminated that condition. (App. A, p. 9a.)

In reaching the first part of its holding, the Sixth Circuit, although recognizing that there was "unquestionably some inconsistency" between the vacation provisions of the Lookout Agreement and the construction of those provisions suggested by Respondent, nevertheless felt that Petitioner's (and the District Court's) approach was too "literal."

In the Sixth Circuit's view, the critical question was whether, "under contract doctrine, the January 1 date is a *material* part of the contract." (App. A, p. 4a.) To resolve this issue, the Sixth Circuit turned to the "past negotiations and contracts of the parties" and reviewed the changes that were made in the vacation pay provisions of the Lookout Agreement in September, 1959.

The Sixth Circuit found that at least as to most, if not all, of the employees at the Lookout plant, employment on a specific eligibility date—namely their "anniversary" date—*was* "critical" and "important" to their vacation rights under the Lookout Agreement prior to September, 1959. (App. A, pp. 4a-5a.) The Sixth Circuit further concluded that the change in the vacation provisions in September, 1959 was "made mostly for administrative reasons" and found that the substitution of January 1 for the "anniversary" date was not "material" to the "primary purpose the parties shared at the time the change was made." (App. A, p. 5a.)

In making this "finding", the Sixth Circuit looked solely to the language of the vacation provisions before and after September, 1959, and ignored Petitioner's uncontroverted evidence as to the relevant industry's practice and experience under the vacation provisions after September, 1959. The Sixth Circuit also failed to consider Petitioner's sworn testimony to the effect that Petitioner's primary purpose in making the change was to insure that the condition of a specific eligibility date was maintained and that Respondent's primary purpose in requesting the change was to obtain the same treatment for vacation purposes for its members as had been given the members of the International.

The second part of the Sixth Circuit's holding was based on its conclusion that, prior to the change in September, 1959, employment on a specific eligibility date—their respective "anniversary" dates—was "critical" and "important" to the vacation rights of most of the employees of the Lookout Plant. Having recognized this, the Sixth Circuit further recognized that "it could be argued that [as a result of the change in September, 1959] while January 1 [became] the day from which vacations could be taken . . . the critical date remained, as it appeared to be in the 1956 contract, the anniversary date." (App. A, p. 7a.) Under this construction, any employee who had not reached his own "anniversary" date at the time of the closing of the Lookout Plant in September, 1966 would not be eligible for full vacation pay for 1967.

The Sixth Circuit then held that assuming that as to these employees, employment on their "anniversary" date was a "material" condition to their eligi-

bility for vacation pay for 1967, under "general rules of contract law", this condition was excused because Petitioner had closed the Lookout Plant.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Sixth Circuit Below That, Under "General Rules of Contract Law", Rights to Vacation Pay Which Had Not Vested at the Time of the Termination of the Lookout Agreement Nevertheless Survived the Termination and That, Under the Same "Rules", Petitioner Became Liable for Such Vacation Pay Solely Because, in Good Faith and for Bona Fide Business Reasons, It Closed the Lookout Plant, Is Contrary to Prior Decisions of This Court and in Conflict With Decisions of Other Circuits.

The Sixth Circuit held that under the Lookout Agreement, permissibly construed, a certain class of Respondent's members (namely those employees whose "anniversary" dates post-dated the closing of the Lookout Plant), were not eligible for vacation pay for 1967. Nevertheless, the Sixth Circuit concluded under "general rules of contract law", that Petitioner was required to pay this class of Respondent's members full vacation pay for 1967 solely because Petitioner had closed the Lookout Plant even though in good faith and for *bona fide* business reasons.

In this regard, the Sixth Circuit's decision is directly in conflict with the decision of the Seventh Circuit in *Local Lodge 2040, International Association of Machinists, AFL-CIO* v. *Servel, Inc.*, 268 F.2d 692 (7th Cir.), *cert. den.*, 361 U.S. 884 (1959). The latter case, which was not even mentioned in the Sixth Circuit's opinion below, involved a factual situation which was identical in all material respects to the factual situation involved in the present case.

There, as here, an employer, in good faith and for *bona fide* business reasons, permanently closed a plant prior to January 1, and, effective upon the closing, discharged the plant's employees.

There, as here, the employees sued the employer claiming that they were entitled to full vacation pay for the calendar year following the plant closing.

There, as here, the court held that the collective bargaining agreement conditioned the employees' rights to vacation pay upon their employment on a specific date which post-dated the closing of the plant.

In *Local Lodge 2040*, however, the Seventh Circuit flatly held that the plant closing did not constitute a breach of the collective bargaining agreement, did not "excuse" the condition precedent to the employee's entitlement to vacation pay and did not, therefore, require the employer to assume an obligation which the terms of the collective bargaining agreement had not imposed upon him. The conflict between the Sixth Circuit's holding below and *Local Lodge 2040* is complete and irreconcilable.

Moreover, in the part of its opinion now under consideration, the Sixth Circuit in effect held that although the rights of certain of Petitioner's former employees were not vested at the time the Lookout Agreement was terminated, these rights nevertheless survived the termination. In this regard, the Sixth Circuit's decision is in conflict with the decisions of the Second Circuit in *Local 1251 Int. U. of U.A., A. & A.I.W.* v. *Robertshaw Controls Co.*, 405 F.2d 29 (2d Cir. 1968), the decision of the Fifth Circuit in *System Federation No. 59, etc.* v. *Louisiana & A. Ry. Co.*, 119 F.2d 509

(5th Cir. 1941), and the decision of the Seventh Circuit in *Local Lodge 2040, International Association of Machinists, AFL-CIO* v. *Servel, Inc.*, 268 F.2d 692 (7th Cir.), *cert. den.*, 361 U.S. 884 (1959) as well as with its own prior decisions in *Charland* v. *Borg-Warner Corporation*, 407 F.2d 1062 (6th Cir. 1969), *Frazer* v. *Magic Chef—Food Giant Markets, Inc.*, 324 F.2d 853 (6th Cir. 1963), *Oddie* v. *Ross Gear and Tool Co.*, 303 F.2d 143 (6th Cir.), *cert. den.*, 371 U.S. 941 (1962) and *Elder* v. *New York Central R. Co.*, 152 F.2d 361 (6th Cir. 1945), all of which held that employees' rights under a collective bargaining agreement do not survive the termination of the agreement unless they are vested at the time of termination. Or, as stated by the Sixth Circuit in its prior decision in *Frazer* v. *Magic Chef—Food Giant Markets, Inc.*, *supra:*

> "A collective bargaining agreement, in ordinary usage and terminology, does not create an employer-employee relationship nor does it guarantee the continuance of one. Employees' rights under such a contract do not survive a discontinuation of business and a termination of operations." 324 F.2d at 856. (Citations, which included the *Local Lodge 2040* case, omitted.)

Finally, the Sixth Circuit's holding that Petitioner's *bona fide* determination to close its Chattanooga plant constituted, under "general rules of contract law", an implied abrogation of the Lookout Agreement is in direct conflict with the decision of this Court in *Textile Workers Union of America* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965), in which this Court held that, absent antiunion animus or unlawful purpose (neither of which were present here), an employer has an absolute right to terminate part of its business op-

erations.* Indeed, this right is essential for "[m]obility of capital, no less than mobility of labor, is a necessary condition of an expanding economy." Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1562 (1962):

> The staggering implications inherent in the ruling of the Sixth Circuit below are self-evident. At its logical extreme it would require every employer who closes a plant during the stated term of a collective bargaining agreement to pay his employees the full amount of all monetary benefits they might otherwise have received over the term of the agreement but for the plant closing which was "effectively a refusal [on the employer's part] to accept the proffer of continued performance on the part of the employees." (App. A., p. 9a.)

In conclusion, it should be noted that the decision of the Sixth Circuit below is in accord with the former decision of the Second Circuit in *Zdanok* v. *Glidden Co.*, 288 F.2d 99 (2d Cir.), *cert. den. on this issue*, 368 U.S. 814 (1961), which also held that employees' non-vested rights survived the termination of the collective bargaining agreement which created them in the first instance. *Zdanok*, however, provoked such adverse comment and gained so little acceptance that the Second Circuit, sitting *en banc*, overruled it in *Local 1251 Int. U. of U.A., A. & A.I.W.* v. *Robertshaw Controls Co., supra.* In doing so, the Second Circuit stated that *Zdanok's* rationale and result had been "erroneous", had "seriously misconceived the nature of the employ-

* This right is, of course, subject to the employer satisfying all obligations which were vested at the time of termination. As noted, however, we are not here dealing with vested rights but, rather, rights which were concededly non-vested.

ment relationship and [had] dealt a 'blow to labor-management relations.'" 405 F.2d at 33. The Second Circuit's description of *Zdanok* is directly applicable to the holding of the Sixth Circuit below on this issue.

The irreconcilable conflict between the Sixth Circuit's ruling below and the contrary decisions both of this Court and of other Circuit Courts as well as the importance of the issue involved clearly warrants the grant of certiorari to review the judgment below. Indeed, Petitioner respectfully submits that the Sixth Circuit's holding on this issue is so demonstrably at odds with such overwhelming authority to the contrary (including certain of the Sixth Circuit's own prior decisions) that it would be appropriate for this Court to grant certiorari on this issue alone and summarily reverse.

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* In its decision on this issue, the Sixth Circuit cited an article by Professor Summers as urging the Court to follow the path laid down by the general rules of contract law. Summers, *Collective Bargaining Agreements and the Law of Contracts*, 78 Yale L.J. 525 (1969). (App. A, p. 8a.) Following that path, the Sixth Circuit based its conclusion below on statements set out in Corbin's treatise on contracts and in the *First Restatement of Contracts*. (App. A, p. 8a.) The Sixth Circuit's reliance was misplaced. In his article, Professor Summers was careful to point out that although collective bargaining agreements are a type of contract, their unique and complex characteristics are such that the blind application of standard contract doctrines to them can only lead to preposterous results. Indeed, in Professor Summers' words, "(s)ad experience has taught labor lawyers to distrust instinctively any arbitration or court opinion that cites the *Restatement of Contracts* or one of the classic treatises." Summers, *supra*, 78 Yale L.J. at pp. 547-548. And, of course, it was on precisely such authority that the Sixth Circuit relied below.

II. In Construing the Vacation Eligibility Provisions of the Lookout Agreement, the Sixth Circuit Applied Standard Contract Law to the Bare Words of the Agreement and Ignored the Common Law of the Particular Industry as Established by That Industry's Practice, Usage and Custom in Identical Situations. In each of These Respects, the Decision of the Sixth Circuit Below Conflicted With Prior Decisions of This Court Establishing the Basic Principles To Be Followed in Construing Collective Bargaining Agreements.

In determining that the January 1 date was not a material part of the Lookout Agreement, the Sixth Circuit ignored at least three fundamental principles established by this Court as being essential to the process of properly construing collective bargaining agreements.

(A) The Sixth Circuit commenced its analysis of the Lookout Agreement by asking whether "under contract doctrine" the January 1 date could be deemed a material part of the agreement. (App. A, p. 4a.)* In so doing, the Sixth Circuit departed from the numerous decisions of this Court holding that, "(a) collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts." *Transportation-Communication Employees Union* v. *Union Pac. Ry. Co.*, 385 U.S. 157, 160-161 (1966), *reh. den.*, 385 U.S. 1032 (1967). See also, *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964); *United Steelworkers*

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*As already noted, the Sixth Circuit also applied "general rules of contract law" in holding that the non-vested rights of a class of Respondent's members survived the termination of the Lookout Agreement. The Sixth Circuit's resort to general contract law, in short, pervaded its entire opinion.

of America v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

(B) In construing the Lookout Agreement, the Sixth Circuit considered only the language contained in the vacation provisions before and after September, 1959 in attempting to determine the "materiality" of the change that occurred in September, 1959. In this aspect of its analysis, the Sixth Circuit failed to take into account the rulings of this Court which establish that "(i)n order to interpret [a collective bargaining] agreement it is *necessary* to consider the scope of other related collective bargaining agreements, as well as the practice, usage, and custom pertaining to all such agreements." *Transportation-Communication Employees Union* v. *Union Pac. Ry. Co.*, 385 U.S. 157, 161 (1966), *reh. den.*, 385 U.S. 1032 (1967). (Emphasis supplied.) *"This principle of looking beyond the bare words to the surrounding circumstances is of fundamental importance in interpreting collective agreements.* The words used may be common words which have uncommon meanings; the provisions are often sparsely stated without the adornment of definitions, qualifications, or specifications of scope; and the surrounding circumstances encompass the whole employment relationship—the processes of production, the history of the bargaining relationship, the past practices of the parties, and even the industrial jurisprudence which has evolved under other bargaining relationships." Summers, *Collective Agreements and the Law of Contracts*, 78 Yale L.J. 525, 549-550 (1969). (Emphasis supplied.)

(C) Moreover, not only did the Sixth Circuit limit its attention to the "four corners" of the Lookout

Agreement in attempting to interpret the effect of the September, 1959 change in its vacation provisions but also sought to find within those "four corners" only the "primary purpose" shared by Petitioner and Respondent in effecting the change. (App. A, p. 5a.) This approach, rooted in common-law principles applicable to private contracts, led the Sixth Circuit to disregard the substantial body of "industrial jurisprudence" that had been developed and applied in the numerous instances of plant closings cited by Petitioner in which, without objection from the International, vacation provisions identical to those contained in the Lookout Agreement at the time of the closing of the Lookout Plant had been consistently construed to preclude any claim for vacation pay for the calendar year subsequent to the calendar year in which the plant was closed. The Sixth Circuit's refusal to recognize the overwhelming importance of this "common law of a particular industry" in construing the Lookout Agreement contravenes one of the most basic tenets established by this Court, namely, that a collective bargaining agreement between a national employer and a local union cannot be viewed in isolation but must be interpreted in the context of the employer's relationship with his entire working force. See, *Transportation-Communication Employees Union* v. *Union Pac. Ry. Co., supra*, 385 U.S. at 160, (in which this Court expressly *rejected* the contention, based on common-law principles, that "each collective bargaining agreement is a thing apart from all others and each dispute . . . must be decided on the language of a single such agreement considered in isolation from all others.") The integrity of this crucial principle—

which has been respected in other Circuits*—has been seriously compromised by the Sixth Circuit's decision below.

Petitioner submits that any one of the conflicts between the Sixth Circuit's judgment below and the prior decisions of this Court would warrant the grant of certiorari to review that judgment. Petitioner further submits that the presence of all of these conflicts compels such review.

III. The Language of the Vacation Eligibility Clause Involved in the Present Case Has Been the Subject of Recurrent Litigation Which Has Led to Conflicting Interpretations Among Lower Courts and Labor Arbitrators. The Resultant Disruption in the Process of Applying Collective Bargaining Agreements Warrants Review by This Court.

This Court has stated that one of the primary goals of federal labor law is the promotion of industrial peace and that this goal necessarily requires a uniform body of federal common-law to insure certainty in the collective bargaining process. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Company*, 369 U.S. 95, 103-104 (1962).

The need for certainty which caused this Court to establish the basic principles governing the construction of collective bargaining agreements generally is equally applicable to specific terms which are used in numerous collective bargaining agreements. Indeed,

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* See, *e.g.*; *Local No. 742, United Bro. of Carpenters & Join.* v. *N.L.R.B.*, — U.S. App. D.C. —, 444 F.2d 895 (1971); *Illinois Cent. R. Co.* v. *Brotherhood of Loc. Engineers*, 443 F.2d 436 (7th Cir. 1971); *Columbia Broadcasting System, Inc.* v. *American Recording and Broadcasting Association*, 293 F. Supp. 1400 (S.D. N.Y.), *aff'd*, 414 F.2d 1329 (2d Cir. 1969).

this Court warned in *Local 174, supra,* that the orderly administration of collective agreements would be severely disrupted and recurrent disputes unduly prolonged if individual contract terms were interpreted differently and assigned contradictory consequences by different courts. *Local Union 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Company, supra,* 369 U.S. at pp. 103-104.

The present case involves precisely the kind of situation which so concerned this Court in *Local Union 174.* The question whether a vacation eligibility clause which, like the clause in the Lookout Agreement, provides for employment "on" or "as of" a specific eligibility date, should be construed to impose a condition precedent to an employee's entitlement to vacation pay, and therefore to preclude a claim for such vacation pay if the plant at which he was employed is closed prior to the specific eligibility date, has been repeatedly litigated in the lower federal courts as well as in the state courts and has been the subject of countless labor arbitrations. The reported decisions are totally inconsistent.

On the one hand, a number of decisions have held that clauses identical with, or closely analogous to, the eligibility conditions contained in Paragraph 50(a)(1) of the Lookout Agreement do make employment on the specified date a condition precedent to qualification for vacation pay. See, *e.g., Local Lodge 2040 International Association of Machinists, AFL-CIO* v. *Servel, Inc.,* 268 F. 2d 692 (7th Cir.), *cert. den.,* 361 U.S. 884 (1959); *Briggs* v. *Electric Auto-Lite Company,* 37 Wis. 2d 275, 155 N.W. 2d 32 (1967); *Brackett* v. *Easton Boot and Shoe Company,* 388 S.W. 2d 842 (Mo. 1965); *Givhan* v. *Federated Metals Div., Amer.*

Smelting and Refining Co., 364 Mich. 370, 110 N.W. 2d 765 (1961); *Botany Mills* v. *Textile Workers Union*, 42 N.J. Super. 327, 126 A. 2d 389 (1956); *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* v. *L. T. Patterson Co.*, 8 Ohio Op. 2d 334, 159 N.E. 2d 923, *aff'd per curiam*, 159 N.E. 2d 917 (1956), *appeal dism'd*, 166 Ohio St. 148, 140 N.E. 2d 318 (1957); *Treloar* v. *Steggeman*, 333 Mich. 166, 52 N.W. 2d 647 (1952); *Oldberg Manufacturing Co.*, 51 Lab. Arb. 509 (Marshall, 1968); *Hillman Transportation Co.*, 46 Lab. Arb. 925 (Mullin, 1966).

Other cases interpret such clauses as imposing no eligibility requirement. See, *e.g.*, *Livestock Feeds, Inc.* v. *Local Union 1634*, 221 Miss. 492, 73 So. 2d 128 (1954); *H. K. Porter Co.*, 49 Lab. Arb. 147 (Cahn, 1967).

This irreconcilable conflict has been recognized by courts and commentators. See, *e.g.*, *In re Muskegon Motor Specialties Co.*, 313 F. 2d 841, 842 (6th Cir.), *cert. den. sub nom.*, *International Union UAW* v. *Davis*, 375 U.S. 832 (1963) (which discusses the conflict between a labor arbitrator and the state courts in construing a vacation clause which required employees to be on the seniority list "as of" a specified date); *Givhan* v. *Federated Metals Div., Amer. Smelting and Refining Co.*, 364 Mich. 370, 110 N.W. 2d 763 (1961) (which notes the irreconcilable conflict between cases); Annot., "Construction and effect of vacation pay clauses in collective labor agreements," 30 A.L.R. 2d 351 (1953).*

* The existence of this conflict was also expressly noted by the District Court below (App. B, pp. 16a-17a).

This existing and irreconcilable conflict as to the proper construction of the language of vacation clauses identical to, or closely analogous with, the language contained in the Lookout Agreement can only be resolved if this Court, as the final arbiter of the substantive principles of federal labor law, intervenes and reviews the judgment below.

IV. In Sustaining Petitioner, the District Court Disregarded, as Immaterial, a Factual Dispute as to the Purpose of the Parties. In Rendering Judgment Against Petitioner, the Sixth Circuit Deemed the Purpose of the Parties To Be Dispositive and Based Its Decision on a "Finding" as to Purpose. In This Regard, the Sixth Circuit Deprived Petitioner of Due Process of Law.

It is indisputable that a party litigant is denied due process of law if, on appeal, a judgment is rendered against it on the basis of a new issue as to which it had no opportunity to present a defense before the trial court. Or stated somewhat differently, this Court has repeatedly held that it is unlawful "to deny . . . appellees their day in court as to a disputed part of the case on which the trial court has never ruled because its view of the law evidently made such a ruling unnecessary." *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 156, *reh. den.*, 374 U.S. 858 (1963). See also, *Fountain* v. *Filson*, 336 U.S. 681 (1949). *Cf.*, *Saunders* v. *Shaw*, 244 U.S. 317 (1917) (Fourteenth Amendment).

The present case was initially decided by the District Court on cross motions for summary judgment at a time when the material allegations contained in Petitioner's supporting affidavits were not controverted. When Respondent moved for reconsideration,

it submitted an affidavit which denied that, as Petitioner's affidavits had alleged, the primary purpose of changing the language of the vacation eligibility provisions in the Lookout Agreement in September, 1959 was (from Petitioner's viewpoint) to maintain a preexisting requirement of vacation eligibility and (from Respondent's viewpoint) to obtain the same treatment for vacation purposes for Respondent's members as had been accorded the International's members under the Master Agreement. The District Court affirmed its prior ruling, thereby holding that any dispute as to these facts was not material, as a matter of law, to the proper construction of the Lookout Agreement. Fed. Rules Civ. Proc., rule 56(c), 28 U.S.C.A.

On appeal, however, in reaching the first part of its holding, the Sixth Circuit ruled that the materiality of the January 1 date in the Lookout Agreement depended on the purpose sought to be achieved by Petitioner and Respondent at the time the date was inserted in the agreement in September, 1959. Thus, whereas the District Court felt that this factual issue was immaterial, the Sixth Circuit felt that it was dispositive. And, since the evidence as to purpose was conflicting, the Sixth Circuit at this point was bound to remand the case to the District Court for a full trial on the issue. See, *e.g., Union Insurance Society of Canton, Ltd.* v. *William Gluckin & Co.*, 353 F. 2d 946 (2d Cir. 1965). Instead, however, the Sixth Circuit made a "finding" as to purpose which then became the basis of its holding that the January 1 date was not a material part of the Lookout Agreement. In doing so, the Sixth Circuit deprived Petitioner of due process of law. *Florida Avocado Growers* v. *Paul*,

supra; Fountain v. *Filson, supra; Saunders* v. *Shaw, supra.**

Petitioner submit that this fundamental flaw in the proceedings below clearly necessitates review of the Sixth Circuit's judgment and, at the very least, vacation of the Sixth Circuit's judgment with instructions to remand the case to the District Court for a full hearing. Petitioner further respectfully suggests that if this limited redress is accorded, a full hearing may obviate the need for this Court to decide the far-reaching issues otherwise inherent in the Sixth Circuit's opinion below. See, *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249 (1948).

* Petitioner concedes that this point was not specifically referred to in Petitioner's motion for reconsideration filed with the Sixth Circuit below (which was the first and only opportunity Petitioner had to raise the point). Since, however, the point has been preserved herein and since it involves plain error as to a fundamental issue going to Petitioner's basic rights, this Court has jurisdiction to review the issue. See, Stern and Gressman, *Supreme Court Practice* §6.37, pp. 298-299 and authorities cited (4th ed. 1969).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

LESTER S. HYMAN
PETER BARNES
LOIS J. SCHIFFER
815 Connecticut Ave., N.W.
Washington, D.C. 20006
Telephone: (202) 296-8020

ROBERT J. BERNARD
NORBERT E. ANDERSON
WALTER B. CONNOLLY, JR.
Greyhound Tower
Phoenix, Arizona 85077
Telephone: (602) 248-4000

Attorneys for Petitioner

Of Counsel:

LEVA, HAWES, SYMINGTON,
MARTIN & OPPENHEIMER

Date: December 14, 1971.

APPENDIX

APPENDIX A

Opinion

No. 71-1098

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LOCAL UNION NO. 186, UNITED PACKINGHOUSE FOOD AND ALLIED WORKERS, AFL-CIO, AN UNINCORPORATED LABOR CORPORATION, *Plaintiff-Appellant*,

v.

ARMOUR AND COMPANY, a Foreign Corporation, *Defendant-Appellee.*

Appeal from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided and Filed August 17, 1971.

Before: EDWARDS, CELEBREZZE and PECK, *Circuit Judges.*

PECK, Circuit Judge. This appeal from a summary judgment raises questions of interpretation of a collective bargaining agreement between Local Union No. 186, United Packinghouse, Food and Allied Workers AFL-CIO, the appellant, and Armour and Company, appellee, concerning the company's liability for vacation pay to its employees when it closed its plant in September, 1966. The union contends that all employees had "earned" vacation pay, to be disbursed in 1967, by the time the plant closed; the company contends, and the District Court agreed, that the employees would be eligible to receive vacation pay only if they were working on January 1, 1967, which they obviously were not, since the plant had closed.

The dispute centers on the following provisions in the agreement:

> "49. Continuous Service and Anniversary Date. The Continuous Service Date of an employee shall be:
>
> "(a) In the case of employes hired hereafter, the employes presently on the payroll who have not as

yet established seniority, the date on which the employe first establishes departmental seniority on the plant payroll.

"(b) In the case of employes presently on the payroll who have established seniority, the plant service date heretofore in effect and use for determining vacation eligibility for each such employe.

"The Anniversary Date of an employe shall mean each anniversary of the employe's last established Continuous Service Date.

"50. Qualification for Vacation:

"(a) Vacations for all employes will be granted on a calendar year basis in accordance with the following eligibility requirements:

"(1) Employes who have one (1) or more years of continuous service as of January 1 (except for new employes provided for below) will be granted vacations during the calendar year January 1 to December 31, provided they have worked a minimum of one hundred fifty (150) days during the preceding calendar year."

* * *

"92. (After providing for separation pay) . . .

"'To the separation allowance computed as per above, add pay for the vacation, if any, for which the employe has qualified but not taken.'"

When the plant closed, separation pay, as provided in § 92, was paid, but the company refused to compensate the workers for what the union contended was already earned vacation pay. The company took the position that the employees had not yet "qualified" for the pay under § 92, and therefore were not due such wages. When arbitration of the dispute proved futile, the union filed a complaint in the District Court. After considering several

affidavits filed by each side, the court determined that summary judgment was proper, and filed an opinion finding for the company. Thereafter, the union filed a supplemental affidavit, but the District Court declined to modify its ruling. The union then perfected this appeal.

The District Court relied heavily on the fact that section 59(a) of the agreement provided that employees mandatorily retired during the year would receive pro-rata vacation pay for each quarter worked, assuming they had worked 38 hours in that quarter. The Court noted correctly that under the union's interpretation this provision would be unnecessary to protect the retiree who had worked 150 days since he would then be entitled to full vacation pay. Indeed, as the Court and the company both observe, a retiree who had worked 150 days might be in worse position than one who had not, since the former may have worked in only two quarters, thus receiving only ½ his vacation pay, while the latter would receive his full pay. From this the Court concluded that, for the non-retiring worker, *only* working 150 days was insufficient to qualify for vacation pay. We conclude that the District Court misconstrued the purpose of § 59(a), which manifestly was to protect the retiree who had not worked 150 days to qualify for full vacation pay. Thus, while there is unquestionably some inconsistency between the literal wording of § 59(a) and the union's position, the common sense of inserting some provision in the contract to protect the mandatory retiree outweighs the literal construction for which the company contends.

Many tribunals have taken the view that vacation pay is simply an alternate form of wages, earned at the time of other wages, but whose receipt is delayed. So eminent a jurist as Judge Learned Hand declared, in 1940, that:

> "A vacation with pay is in effect additional wages. It involves a reasonable arrangement to secure the well-being of the employees and the continuance of har-

> monious relations between employer and employee. The consideration for the contract to pay for a week's vacation had been furnished, that is to say, one year's service had been rendered prior to June 1, so that the week's vacation with pay was completely earned and only the time of receiving it was postponed." In re *Willow Cafeterias, Inc.*, 111 F.2d 429, 432 (2d Cir. 1940).

Although in different contexts, this Court has recognized that concept. *Smith* v. *Kingsport Press, Inc.*, 366 F. 2d 416 (6th Cir. 1966); *Hue* v. *E. I. DuPont DeNemours and Co.*, 324 F. 2d 546 (6th Cir. 1963).

This view of vacation pay indicates that the company gains no substantive benefit per se from requiring employees to be "on the payroll" on January 1, but rather has gained the benefits from the work done in the previous year. Thus, there is no difference in terms of eligibility, between the worker who has worked only 150 days, and one who has worked 360. The company has derived in effect the same benefit from the work of both—and has agreed to pay additional wages to both. From this approach, then, we must ask whether, under contract doctrine, the January 1 date is a *material* part of the contract, rendering the failure to meet that condition fatal to the worker, or whether, on the other hand, it is something less than critical to the purpose of the parties.

The resolution of this issue requires consideration of the past negotiations and contracts of the parties. Such an inquiry reveals that, prior to the 1960 contract, there were two key dates for each employee: his "continuous service date," basically the day on which he originally began work, and his "anniversary date," which indicated an anniversary of the continuous service date. In the 1956 contract, an employee was eligible for vacation pay "after the Anniversary Date." While first year employees were required to work 185 days to qualify for vacation, other

employees received vacation unless they had been absent for 60 continuous days.* It thus appears that, in 1956, the critical point was the anniversary date. There were, however, two major exceptions: (1) Employees who had been employed between 2-5 years could, upon request, be allowed to take their vacations up to 3 months in advance of their anniversary date. This, however, was only allowed because "it is presumed [he] will continue in the employment of the plant up to his anniversary date." Thus, at least in this context, the requirement of working until the anniversary date was important. (2) Employees who had worked more than 5 years were allowed to request vacation up to 5 months in advance. Here, however, there was no express contractual assumption that these employees would work until the anniversary date.

The critical change came in 1960. In that year a new clause, "Qualification for Vacation," was added to the contract. Vacations were made available only on a calendar year basis, and January 1 was the date on which eligibility turned. Thus, where the 1956 contract had provided that a new employee had to work 185 days before his anniversary date, he now had to work 150 days before January 1. The 1960 contract also dropped the provisions allowing long-time employees to take vacations early.

From this, the company urges that January 1 was made the anniversary date, and, moreover, that it was imperative that the employee be working on January 1 in order to take vacation. There is much substance in the argument which the company presses on us, but we find that the fact that the contract in several places differentiates the "anniversary date" from January 1 indicates sufficiently that, however plausible the argument might now seem, that was not the primary purpose the parties shared at the time the change was made. Instead, we conclude

* There were other methods by which the employee could still become eligible for vacation, but they are irrelevant here.

that the change was made mostly for administrative reasons, to allow the company to have all vacations earned in a prior calendar year taken in the calendar year next succeeding. We find, therefore, that the change in the date of eligibility from the anniversary date to January 1 was not a change of a material nature, but one of administrative convenience, and that the January 1 date was not a sine qua non for eligibility for vacation.

When situations such as this have arisen in the past, they have almost uniformly been resolved in the union's favor. In *Mays Landing Water Power Co.*, 12 L.A. 861 (1949), the employer shut down before a date which, in contrast to the ambiguous January 1 date here, was clearly an eligibility date. Nevertheless, the arbitrator granted vacation pay, stating that "The (eligibility date) is simply a device for finally implementing the results of accumulated employment experience. To ignore the accumulation of such past employment experience because of the impossibility of meeting the eligibility day is to give undue determinative significance to only one of the generally qualifying tests." *Id.* at 863. Similarly, in *L. Hyman Co., Inc.*, 13 L.A. 803 (1949), where the contract was again clear that employees had to be "on the payroll" on a specified date, the arbitrator adhered to the concept that vacation pay is an earned right, based primarily upon service, and that the employees were entitled to full vacation pay when the plant closed prior to the eligibility date. *Accord: Star Woolen Mill Co.*, 14 L.A. 185 (1950). While these cases are of course not controlling, they are indicative of the approach taken in labor arbitration. In addition, they represent well-established precedents of which the parties should have been aware. Had they desired to alter the case law, they should have done so by explicit language. Professor Archibald Cox, in a decision cited to us by both sides, wherein he acted as arbitrator, commented that clauses specifying that only employees employed on a specific date are eligible for vacation are common pri-

marily because of these past decisions. *Telescope Folding Furniture Co.*, 49 L.A. 837 (1967). In that case, which closely parallels this, the contract provided that the following employees were eligible to receive vacation pay:

> "All employees who have been on the payroll of the company for one (1) year or longer prior to August 1 of the vacation year. Employees to be eligible for one (1) weeks (sic) vacation shall have worked (140) working days prior to August 1 of the vacation year.

The contract provision is obviously not the same as that here. But the issue was precisely the same. And Professor Cox responded as follows:

> "The agreements mention August 1 only as a cut-off date for determining length of service. There is no clause stipulating that vacations should be limited to workers on the payroll or otherwise in the Company's employ, on August 1, or any other particular date . . . . Under contracts containing no express requirements that the employees be on the payroll or in the Company's employ on any particular date in order to qualify for vacation, both the state and federal courts, and also many arbitrators, have held that an employee is entitled to his vacation pay even though his employment was permanently severed prior to the vacation period." *Id.* at 838.

That case was much stronger for the company, since it involved employees who resigned. The present case, which concerns only involuntarily unemployed workers, must fall within the ambit of Professor Cox's declaration.

This, however, does not necessarily resolve the issue. Even if this view is accepted, it could be argued that it goes no further than saying that while January 1 was the day from which vacations could be taken (without special dispensation), the critical date remained, as it appeared to be in the 1956 contract, the anniversary date. Although that

is nowhere required in the contract. It is a permissible, if somewhat strained, interpretation, in light of the past bargaining history. Thus, our conclusion that January 1 is *not* the anniversary date may only benefit those workers who had already reached their own, individual, anniversary dates by the time of closing. For those workers who had not reached their anniversary date by the date of the closing, we face the question of whether it was necessary that they reach that date or whether, as the union has contended, the mere fact of working 150 days qualified them for vacation.

In determining this issue, we turn to the general rules of contract law, a path which has been urged by many. See, e.g., Summers, Collective Bargaining Agreements and the Law of Contracts, 78 Yale L.J. 525 (1969). Even assuming the company's argument that the anniversary date was an inexorable condition of eligibility for vacation, we find critical the fact that it was the action of the company itself which made impossible the satisfaction of this condition. This situation is covered fully by Professor Corbin:

> "The occurrence of the event is eliminated as a condition if it is prevented by the fault of the promisor—either as a breach of an actually implied promise, by intentional action to avoid having to pay, or by wrongful negligence. This is true even if the contract is aleatory; the promisor must not wrongfully increase the risk carried by the promisee." 6 A. Corbin, Contracts § 1252, p. 509 (2d ed. 1962).

Similarly, the First Restatement on Contracts, § 415 (1932), declares:

> "A duty under a unilateral or independent contractual obligation . . . is discharged by a manifestation by the obligee to the obligor, at or before the time when performance is due, of unwillingness to receive the performance when due . . ."

This doctrine has not been lost on labor arbitrators themselves. In one of the earlier cases on this point, *Mays Landing Water Co.*, 12 LA 861 (1949), the arbitrator, in awarding vacation pay for workers left unemployed by reason of a plant shutdown, observed:

> "By shutting down plant operations the Company has made it impossible for union members to perform under the agreement .... This represents abrogation of contract by preventing or hindering performance by the other party. When one party to a contract prevents or hinders performance requirements under that contract for the creation of, continuance of a right in favor of the other party, the party initiating the preventing or hindering act is properly liable." *Id.* at 863.

Thus it appears that the company's unilateral action in closing down the plant, which is effectively a refusal to accept the proffer of continued performance on the part of the employees, removes the obligation of working until their anniversary dates, even if it is viewed as a material part of the contract.

Accordingly, an order will be entered reversing the judgment of the district court, and entering judgment for the appellant union.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

Civil Action No. 5686

LOCAL UNION NO. 186, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO

—vs.—

ARMOUR AND COMPANY

Memorandum

This action was instituted by Local Union No. 186, pursuant to Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) for recovery of vacation pay allegedly due its members under a collective bargaining agreement entered into upon November 2, 1964, between United Packinghouse, Food and Allied Workers, AFL-CIO, on behalf of Local Union No. 186 and Lookout Oil and Refining Company, a division of Armour and Company.

This action is presently before the Court upon cross-motions for summary judgment.

The facts appear to be undisputed. Local Union No. 186, United Packinghouse, Food and Allied Workers, AFL-CIO (hereinafter referred to as the "Union") at all times material to this action was the exclusive bargaining representative of production and maintenance employees of Lookout Oil and Refining Company, a division of Armour and Company (hereinafter referred to as the "Company") and was engaged in representing these employees. Specifically, the Union and the Company entered into a collective bargaining agreement upon November 2, 1964, to be effective from September 18, 1964, and continuing until

September 17, 1967. This agreement fixed the terms and conditions of employment of all employees included within the plaintiff's bargaining unit.

Section XI of the Collective Bargaining Agreement entitled "Vacations" specifies in considerable detail the relevant contract terms relative to qualifications for vacation, length of vacation, computation of vacation pay, etc.

Further, Section XIX—Separation Allowance, provides: "To the separation allowance computed as per above, add pay for the vacation, if any, for which the employee has qualified but not taken." Section XI, paragraph 50, provides for the qualifications for vacations, that is:

> a) Vacations for all employees will be granted on a calendar year basis in accordance with the following eligibility requirements
>
> 1) Employees who have one (1) or more years of continuous service as of January 1 (except for new employes provided for below) will be granted vacations during the calendar year January 1, to December 31, provided they have worked a minimum of one hundred fifty (150) days during the preceding year. . .
>
> 2) A new employee shall become eligible for his first vacation with pay upon his first anniversary date provided he has worked a minimum of one hundred fifty (150) days during his first anniversary year, counting as days worked those set forth in Item (1) above. On the following January 1, he shall be eligible for a vacation with pay in accordance with the provisions as set forth in Item (1) above.

In September of 1966 the Company ceased doing business in Chattanooga, Tennessee, and sold its plant facilities to another company. As a result of this cessation of

business the Company laid off its employees upon September 18, 1966. The Company paid to the employees a separation allowance and all vacation benefits for the year 1966, that is, vacation pay earned in 1965. However, the employees were not paid vacation pay for the year 1967. The plaintiff union contends that its members, employees of the Company, are entitled under the collective bargaining agreement to vacation pay earned in 1966 that would have been paid in 1967, except for the defendant's cessation of operations.

The defendant Company contends that under the terms of the collective bargaining agreement the plaintiff's members were not eligible for vacation pay for 1967 and accordingly the Company has refused and continues to refuse to pay vacation benefits for 1967.

This controversy was submitted to the grievance procedure under the collective bargaining contract. However, the matter was not settled under the grievance procedure and in view of the fact that the collective bargaining agreement does not provide for compulsory arbitration this action was commenced.

The Court is of the opinion that there is no genuine issue as to any material fact in dispute and that this action may properly be decided as a matter of law. See Rule 56, *Federal Rules of Civil Procedure*.

The respective legal positions of the parties can be summarized as follows. The plaintiff contends, in support of its motion for summary judgment, that the only qualification for vacation pay under the instant factual situation is that the plaintiff's members worked a minimum of 150 days during the 1966 calendar year. On the other hand, the defendant contends, in support of its motion for summary judgment, that the collective bargaining contract clearly contemplates two conditions precedent before an employee would be eligible for vacation with pay: (1) that he has worked a minimum of 150 days during the pre-

ceding calendar year, and (2) that he was employed on January 1 of the calendar year during which the vacation is to be taken.

Accordingly, the solution to the legal problem presented becomes one of contract interpretation.

In embarking upon this analysis of the collective bargaining agreement this Court is aided by certain guidelines developed by the Supreme Court with respect to the construction of collective bargaining agreements generally. First of all, *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956), establishes that, like other contracts, collective bargaining agreement must be read as a whole and in light of the law relating to it when made. *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed. 2d 1409 (1960), the first of the three cases commonly referred to as the steelworkers' trilogy, explains that:

> The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant . . . There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or twenty pages. Within the sphere of collective bargaining the institutional characteristic and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.

In effect, therefore the collective bargaining agreement is not an ordinary contract but rather a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See *Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S. Ct. 909, 11 L.Ed. 2d 898 (1964).

Expanding upon this general explanation of the collective bargaining agreement the Court in transportation, *Communication Employees Union* v. *Union Pacific Railroad Company*, 385 U.S. 157, 87 S. Ct. 369, 17 L.Ed. 2d 264 (1966) reh. den. 385 U.S. 986 stated that:

> In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage, and custom pertaining to all such agreements.

Further, the Court emphatically concluded that "a collective bargaining contract is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common law concepts which control such private contracts. It seems quite clear that in analyzing collective bargaining agreements, the language of the contract itself should be accorded a liberal rather than a strict and technical interpretation. *See NLRB* v. *C & C Plywood Corp.*, —— U.S. ——, —S. Ct. ——, 17 L. Ed. 2d 486 (1967).

With these general guidelines attention will initially be turned, in the instant case to the affidavits of Fred A. Peterson and William C. Campbell. Mr. Peterson, a former employee of Armour and Company, was engaged during his term of employment in labor relations work for the Company, including the negotiation of collective bargaining agreements. Mr. Campbell is currently employed by Armour and Company in the capacity of manager labor relations. The affidavits reflect the history and past experience of the Company with respect to the vacation pay language contained in the collective bargaining agreement that is the subject of the present litigation. The affidavit of Mr. Peterson reflects that the vacation pay language of the Lookout Oil and Refining Company collective bargaining agreement (hereinafter referred to as "Lookout Contract") was taken from the "Master Agreement" then in

effect between the Company and United Packinghouse Food and Allied Workers, AFL-CIO (See copy of Master Agreement—Exhibit A to affidavit). Mr. Peterson avers that as of the September 1959 Master Agreement the vacation pay provisions were changed in order to standardize all Company employee vacations, that is all vacations are granted on a calendar year basis, with January 1 of each year being made the "anniversary date." Mr. Peterson further avers that the Company has not paid vacation pay to employees under the vacation pay provisions where there have been plant closings unless the employees have satisfied two qualifications: (1) they were in the employment of the Company on January 1 of the year during which the vacation was to be taken; and (2) they have worked a minimum number of days during the preceding calendar year.

The affidavit of Mr. Campbell substantiates and reaffirms by example the principle adhered to by the Company in the instant case, that is, that the employee must satisfy two conditions precedent to be eligible for vacation pay. Specifically, Mr. Campbell cites the closing of Armour and Company plants in Fort Worth, Texas, Sioux City, Iowa, and Kansas City, Kansas. Mr. Campbell avers that the vacation pay clauses being identical to those contained in the Lookout Contract were administered exactly the same as in the instant case; that is, the employees were not given a vacation as a result of working the minimum 150 days during the calendar year in which the plant was closed.

Further, Mr. Campbell cites the closing of Armour and Company plants in Decker Houston, Texas, New Bedford, Massachusetts, and Elizabeth, New Jersey. These plants were covered by collective bargaining agreements with the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter referred to as "Amalgamated Union") and the vacation eligibility language in these contracts was identical to that contained in the Look-

out Contract. Mr. Campbell avers that the Company administered these vacation pay provisions in a manner identical to that under the Lookout Contract without objection from the Amalgamated Unions.

Finally, Mr. Campbell avers that the Amalgamated Union presented as one of its contract demands under the Master Agreement in February, 1970 a request for "Full pro-rata vacation pay to be payable on the date of close-down."

The plaintiff has submitted the affidavit of one F. L. Tate. Mr. Tate's affidavit reflects that he was an employee of Lookout Oil and Refining Company for 29½ years, that is up to and including the shut down of the plant. Mr. Tate avers that all 125 employees, except possibly one, whose names are attached to the complaint, worked at least 150 days during 1966.

With respect to the past practices of the Company, Mr. Tate avers that "Prior to September 18, 1966, there had been individual employees laid off for economic reasons, and without exception, they were paid their earned vacation during that year provided they had worked 150 days."

There appears to be two lines of authority dealing with the nature of vacation pay and how to treat a specified eligibility date in determining an employee's right to vacation pay where the employer discontinues its business.

In *Treloar* v. *Steggeman*, 333 Mich. 166, 52 N.W. 2d 647 (1952), relied upon by the defendant, the Court, in denying pro rata vacation pay stated:

> "Plaintiff claims that the agreement should be liberally construed in his favor. The agreement clearly prescribes a condition precedent to vacation pay that the employee shall be on the seniority list on December 1, 1947, as well as having completed at least 6 months work since December 1, 1946. The two conditions precedent are clearly stated and there is no

doubtful meaning to be resolved in plaintiff's favor. We must apply the clear provisions of the agreement as we find them. It was competent for the parties to fix and agree upon December 1, 1947 as the eligibility date and it is not for the Court to advance the eligibility date to suit the convenience or wishes of one party to the agreement. It is not for us to review or redetermine the considerations that led to the fixing of the date as December 1, 1947.

"Plaintiff and his assigns have failed to qualify under the requirements of the agreement and are not entitled to vacation pay."

The opposite line of authority holds that in spite of vacation clause which provides for a specific eligibility date, if the employment was terminated earlier by the employer, the employee was entitled to a pro rata share of the vacation pay. See *Livestock Feeds, Inc.* v. *Local Union 1634*, 221 Miss. 492, 73 So.2d 128. This line of cases appears to be based upon the following analysis by Judge Hand in *In re Willow Cafeterias, Inc.*, 111 F.2d 429 (C.A. 2, 1940):

"A vacation with pay is in effect additional wages. It involves a reasonable arrangement to secure the well-being of the employees and the continuance of harmonious relations between employer and employee. The consideration for the contract to pay for a week's vacation had been furnished, that is to say, one year's service had been rendered prior to June 1 so that the week's vacation with pay was completely earned and only the time of receiving it was postponed. If the employer had discharged the employee wrongfully after the latter had done the work necessary to earn a vacation he could not be deprived of the benefits due him. . ."

Both the Tennessee Supreme Court and the Sixth Circuit Court of Appeals recognize this principle enunciated by

Judge Hand. See *Textile Workers Union of America* v. *Brookside Mills*, 203 Tenn. 71, 309 S.W. 2d 371 (1957); *Hue* v. *E. I. DuPont DeNemours and Company*, 324 F.2d 546 (C.A. 6, 1963); *Smith* v. *Kingsport Press, Inc.*, 366 F.2d 416 (C.A. 6, 1966).

However, each of these cases is distinguishable from the instant case. The factual and legal questions involved in *Hue* v. *E. I. DuPont DeNemours and Company, supra*, were very substantially different from those involved in the present case. That is, although the Court stated the principle heretofore enunciated by Justice Hand, the legal question involved was whether the plaintiff's right of action for severance pay was barred by the Tennessee Statute of Limitations (T.C.A. § 28-305).

Smith v. *Kingsport Press, Inc., supra*, dealt specifically with vacation pay provisions of a collective bargaining agreement and the Court concluded under the terms of the contract that vacation pay was consideration for past service rendered and was accordingly due and payable to the employees in that case. The collective bargaining agreement in the *Smith* case provided in part as follows:

> "Section 4. To receive this vacation allowance a member must be
>
> a. On the payroll on the Fourth Friday in March;
>
> b. Must have worked at least 40 full weeks during the 52 weeks immediately preceding the first Saturday in March. By a full week's work is meant the time the employee is scheduled to work throughout any given week.
>
> c. An employee's status on the first Saturday in March will be used to determine his weekly rate and his seniority.

Two questions were presented to the Court of Appeals. First, were strikers who worked 40 full weeks during the 52 weeks preceding the first Saturday in March "em-

ployees" within the terms of the collective bargaining agreement. Second, were these strikers "on the payroll" within the terms of the collective bargaining agreement although they were not actually working upon the "fourth Friday in March." The Court answered both questions in the affirmative but qualified their conclusion in the following terms:

> "We are further satisfied that *absent any language to the contrary* we must conclude that the vacation pay for which the collective bargaining agreement provided was consideration for past service rendered and was therefore due and payable to the employees in question in this case. (Emphasis supplied)

Finally, *Textile Union 513 v. Brookside Mills, Inc.*, 203 Tenn. 71, 39 S.W. 2d 371 (1957), involved a factual and legal situation that was more nearly similar to the instant case. Specifically, the question raised by the *Brookside Mills* case was whether employees who had not received any vacation pay since July 7, 1955, and were discharged in January, February and March of 1956 when the Company ceased operations, were entitled under the collective bargaining agreement to recover vacation pay from July 7, 1955. The language of the collective bargaining agreement in that case provided in part:

> Article XVI
>
> VACATIONS
>
> Section 1. All employees who on June 1, 1950, and on June 1 of each succeeding contract year, have continuous service with the Employer will be paid vacation pay according to the following schedules: * * *

The Court recognized that where a contract is clear in its meaning and the employee fails to bring himself within its terms, the Court should not rewrite the contract. Additionally, the Court observed that: "The parties are in agreement that vacation pay is in effect additional wages

or compensation and that the right to receive same is entirely dependent upon contract." The Court held under the facts of that case that the language of the collective bargaining agreement was not "free of ambiguity" in that 1) the contract did not provide that "all who are employees on June 1" but rather stated "all employees who on June 1, . . ." 2) the contract failed to define "continuous service." Based upon these ambiguities the Court concluded that by depriving these employees of their vacation pay it "would be reading into the contract a provision for a forfeiture," which did not exist. Accordingly, the Court affirmed the Chancellor finding that the employees were entitled to recover vacation pay from July 7, 1955, to the date of their discharge.

The contract in the instant case provides explicitly for "continuous service." Section XI, paragraph 48, states:

> An employee's continuous service for vacation purposes shall be deemed to begin with his Continuous Service Date (as defined in Paragraph 49) and shall be broken when an employee has quit, or has been discharged, or has remained in a status of layoff for a continuous period of two (2) years, *or has otherwise separated from Company's employment.* If an employee whose Continuous Service has been broken is later re-employed, he will thereafter, if retained in the Company's employment, establish a new Continuous Service Date in the same manner as other newly hired employees. (Emphasis supplied)

Further, Section XI, paragraph 50, describes the "Qualification for Vacation" in the following terms:

> a) Vacations for all employees will be granted on a calendar year basis in accordance with the following eligibility requirements.
>
> 1) Employees who have one (1) or more years of *continuous service as of January 1* (except for

new employees provided for below) will be granted vacations during the calendar year January 1 to December 31, provided they have worked a minimum of one hundred fifty (150) days during the preceding calendar year . . .

2) A new employee shall become eligible for his first vacation with pay upon his first anniversary date provided he has worked a minimum of one hundred fifty (150) days during his first anniversary year, counting as days worked those set forth in Item (1) above. *On the following* January 1, he shall be eligible for a vacation with pay in accordance with the provisions as set forth in Item (1) above. (Emphasis supplied)

Finally, Section XI, paragraph 52, specifies the means by which vacation pay is to be computed.

Vacation pay for each week of vacation which an employee is entitled to receive shall be computed by determining *the total money earned from January 1 (of the year in which the vacation is taken)* through the last payroll week completed prior to the date of the vacation and dividing that sum by the number of weeks worked since said January 1 through such payroll week . . . (Emphasis supplied)

It is to be noted further that Section XI, paragraph 59(a) provides as follows:

Employees retiring pursuant to the compulsory retirement provisions of paragraph 67(a), shall be granted a pro rata portion of the amount of vacation described in paragraph 51, computed as follows:

For each period of three (3) consecutive months (from January 1 of the year in which the employee retires to date of retirement) in which the employee

> works a minimum of thirty-eight (38) days, he shall be granted one-fourth (¼) of the amount of vacation described in paragraph 51. Such pro rata vacation shall be in addition to the vacation, if any, for which the employee qualified as of the preceding December 31.

This contract provision is most significant in that it indicates clearly that the parties contemplated and negotiated upon the subject of pro rata vacation pay for those employees terminated by reason of retirement. If, as plaintiffs appear to contend, vacation pay accrues as additional wages and these employees are entitled to their accrued vacation pay by reason of the fact that they have accrued such pay by working 150 days, then it would appear that Section 59(a) of Article XI is superfluous. If the plaintiff's interpretation of the contract provisions regarding vacation pay is accepted, a retiring employee with 150 days of service in 1966 would be entitled to full vacation pay without further provision therefor in the contract. However, the contract specifically provides that retiring employees are to receive a pro rata portion of their vacation pay based upon 38 days work for each three month period from January 1 of the year of retirement to the date of retirement, thus specifically excluding retiring employees from the January 1 eligibility date. No other class of employees is so excluded from the "continuous service" requirement. This provision of the contract would indicate an intention to exclude only retiring employees from the "continuous service" requirement of the contract and from the "January 1" eligibility requirement. See *Brackett* v. *Eastern Boot & Shoe Co.*, (Mo. 1965) 388 S.W. 2d 842.

The plaintiff also relies upon paragraph 54 in support of its position. This paragraph provides:

> Employees who have earned vacations under this vacation plan, but who may become sick, laid off by

management, or injured prior to the date selected for their vacation pay, upon request to the management shall receive their vacation."

It would seem that this provision, applying, as it does, only to "employees who have earned vacations," is consistent with the contract interpretation that the employees meet the January 1 employment eligibility requirement for obtaining vacation pay.

Applying the general principles heretofore outlined by the Court to the contract provisions in the instant case, it appears clear that the parties contracted that two conditions precedent must exist in order for an employee to be eligible for vacation pay, that is, (1) that the employee have worked a minimum of 150 days during the preceding year, and (2) that the employee was employed upon January 1 of the calendar year during which the vacation is to be taken. The language of the contract appears clear and free from ambiguity in this respect.

Accordingly, the plaintiff's motion for summary judgment will be denied and the defendant's motion for summary judgment will be granted. An order will enter sustaining the defendant's motion and dismissing the lawsuit.

FRANK W. WILSON
United States District Judge

* * *

Order

This is an action instituted pursuant to § 301 of the Labor-Management Relations Act (29 U.S.C. § 185) for the recovery of vacation pay allegedly due unto employees of the plaintiff's union under a collective bargaining agreement. The case is before the Court upon cross motions for summary judgment. Having considered the respective motions, the record in the case, and the briefs of the parties, and for the reasons set forth in a memorandum

opinion filed herein, the Court is of the opinion that the plaintiff's motion for summary judgment should be denied, that the defendant's motion for summary judgment should be sustained, and that this lawsuit should be dismissed.

It is accordingly ORDERED that the plaintiff's motion for summary judgment be and the same is hereby denied. It is FURTHER ORDERED that the defendant's motion for summary judgment be and is hereby sustained. It is FURTHER ORDERED that this lawsuit be and the same is hereby dismissed.

APPROVED FOR ENTRY.

FRANK W. WILSON
United States District Judge

ATTEST:
A true copy.
Certified this 10-20-70

Earl D. Saulpaw, Jr., Clerk
By Bertha Morgan
Deputy

APPENDIX C

Order

This case is before the Court upon the plaintiff's motion seeking reconsideration of the Court's prior order denying the plaintiff's motion for summary judgment and dismissing the lawsuit. The plaintiff contends in support of its motion that the Court erred in basically two respects:

1) in attaching undue weight to certain affidavits submitted by representatives of the defendant Company; and

2) in failing to follow the applicable and controlling case law.

In this latter regard, the plaintiff relies heavily upon an arbitration decision, *Telescope Folding Furniture Company*, 49 L.A. 837 (1967), written by Archibald Cox, Professor of Law at Harvard University. However, it should be noted that in this opinion Mr. Cox states:

> "There is no clause stipulating that vacations shall be limited to workers on the payroll, or on the seniority list, or otherwise in the Company's employ, on August 1 or any other particular date. Such clauses are quite common in collective agreements, although they are probably omitted more often than they are included. If there were such a clause in the Telescope contract, the Company's position would be correct. In fact, there is none. The arbitrator cannot ignore the omission of such critical words."

In the instant case, this Court concluded, based upon the specific contract language in the Lookout Oil and Refining Company agreement, that the parties contracted that two conditions precedent must exist in order for an employee to be eligible for vacation pay, that is, (1) that the employee have worked a minimum of 150 days during the preceding

year, and (2) that the employee was employed upon January 1 of the calendar year during which the vacation is to be taken. In reaching this conclusion, the Court outlined the relevant case law, past practices of the Company, and certain principles applicable generally to the construction of collective bargaining agreements. The ultimate conclusion reached by the Court was based primarily upon the contract language as agreed to by the parties. Precedent, past practices, and general principles at most provide the Court with guidelines. "Each labor contract stands on its own feet." See *Telescope Folding Furniture Company, supra.*

Having reviewed the record and having considered the plaintiff's motion, brief and supporting affidavit, the Court remains of the opinion that the former action in dismissing the lawsuit was proper for the reasons stated in the Court's memorandum entered herein. The motion to reconsider will accordingly be denied.

It is SO ORDERED.

APPROVED FOR ENTRY.

FRANK W. WILSON
United States District Judge

ATTEST:

A true copy.

Certified this 11-30-70

Earl D. Saulpaw, Jr., Clerk
By Bertha Morgan
Deputy

APPENDIX D

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. (June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a

summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

Supreme Court, U.S.
FILED
FEB 1 1972
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-788

ARMOUR AND COMPANY,
Petitioner,

vs.

LOCAL UNION NO. 186, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, an Unincorporated Labor Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

S. DEL FUSTON
522 Maclellan Building
Chattanooga, Tennessee 37402
Telephone: (615) 266-6423
Attorney for Respondent

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondent, Local Union No. 186, United Packinghouse, Food and Allied Workers, AFL-CIO, an unincorporated labor association[1] opposes the Petition for Writ of Certiorari.

[1] The style of this case states Respondent is "an unincorporated Labor Corporation". This was obviously a typographical error in the lower Court caption which was overlooked.

Respondent respectfully prays not to review this cause but to deny the Petition for Writ of Certiorari because of the following:

1. The questions presented are foreign to the decision of the Sixth Circuit.

2. The decision of the Sixth Circuit is not in conflict with the decision of another Court of Appeals or of The Supreme Court.

3. The decision of the Sixth Circuit does not involve an important question of federal law which has not been, but should be, settled by the Supreme Court.

4. The decision below turns on its own particular facts and will not affect anyone except the litigants.

5. The decision of the Sixth Circuit in this cause is correct.

The Opinions below and Jurisdiction of this Court are correctly stated by Petitioner.

REPLY TO QUESTIONS PRESENTED BY PETITIONER

In response to the four questions submitted by Petitioner, Respondent would show as follows:

I

The question whether or not the employer closed its plant in good faith and for bona fide business reasons was never raised in this cause or any other legal proceedings.

The question before the District Court and the Sixth Circuit involved facts wherein employees were terminated before the beginning of the year in which vacations were to have been taken. The question under the Collective

Bargaining Agreement was whether or not the employees were entitled to vacation pay for work performed in 1966. The employer contended the employees must be actively employed on the first day of the vacation year.

The employees contended that all the conditions for vacation pay had been fully met, the vacation had been fully earned and only the time of receiving same had been delayed.

II

Question Two should be paraphrased as follows: Was it proper for the Courts below to consider among other factors (A) to apply "general rules of contract law as used by Labor Arbitrators" (B) to look to the specific language of the contract, and (C) to consider relevant industrial practice usage and custom?

III

A counter statement of Question Three is as follows: Should this Court consider the construction of typical vacation eligibility provisions in a collective bargaining agreement when the lower Federal Courts and an overwhelming majority of labor arbitrators are in agreement as to law?

IV

Question Four proposed by Petitioner was never raised prior to this Petition for Certiorari.

Based upon the record, the Sixth Circuit did not make a different "finding" as to facts, but, based upon competent facts, came to a different legal conclusion than the District Court.

REPLY TO STATEMENT OF CASE

As previously stated, the issue of the right of the employer to close its Chattanooga plant was never questioned in the proceedings below.

The Sixth Circuit considered applicable Federal law. There is no conflict between its decision and the decision of another Court of Appeals. The Sixth Circuit followed the guidelines adopted by this Court. The rule followed by the Sixth Circuit is the same as used by labor arbitrators.

Petitioner had its day in Court, and prior to this Petition for Certiorari, never raised the question of Due Process of Law.

PROCEEDINGS BEFORE THE DISTRICT COURT

A

Basic Facts

On September 18, 1966, Petitioner sold its Chattanooga Lookout plant facilities, rather than the plant facilities and collective bargaining agreement, to Swift & Company. Most or all of the employees had received their vacation in the summer of 1966 which had been earned in 1965. When the plant closed, any employee who had not already received this vacation pay for 1965 was then paid. The employees contended they had earned vacation pay in 1966 which normally would have been paid in 1967. When the Petitioner refused payment, Respondent invoked the limited arbitration procedure. When Petitioner refused to permit the case to go to final arbitration as the contract did not provide for compulsory arbitration, this suit was precipitated.

B

Vacation Provisions in Lookout Agreement

It is agreed that Petitioner and the International negotiated master agreements covering large meat-processing plants in the Chicago area. These master agreements were always negotiated in advance of the Lookout Contract.

Respondent is a completely autonomous, self-governing union that negotiated its own contracts. The masters' agreement was used solely as a guide but through the years, the Lookout agreement was altered by wording of various provisions and providing for many additional or different benefits (App., p. 95a). The applicable provisions of the Lookout agreement are as follows:

Paragraph 92 (App., p. 110a) provided that if the employees were separated, they should be paid for any vacation for which the employees had qualified but not taken. Paragraph 54 (App., p. 107a) provided employees who had earned vacations but were laid off by management prior to the date selected for their vacation pay would receive such pay. The contract did not define what was meant by "earned vacations". Other pertinent sections in the Lookout Agreement are as follows:

> "48. Continuous Service. An employe's continuous service for vacation purposes shall be deemed to begin with his Continuous Service Date (as defined in Paragraph 49) and shall be broken when an employe has quit, or has been discharged, or has remained in a status of layoff for a continuous period of two (2) years, or has otherwise separated from Company's employment."[2]

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[2] The other portion of this paragraph is not relevant herein.

"49. Continuous Service and Anniversary Date. The Continuous Service Date of an employe shall be:

(a) In the case of employes hired hereafter, the employes presently on the payroll who have not as yet established seniority, the date on which the employe first establishes departmental seniority on the plant payroll.

(b) In the case of employes presently on the payroll who have established seniority, the plant service date heretofore in effect and use for determining vacation eligibility for each such employe.

The Anniversary Date of an employe shall mean each anniversary of the employe's last established Continuous Service Date."

"50. Qualification for Vacation:

(a) Vacations for all employes will be granted on a calendar year basis in accordance with the following eligibility requirements.

(1) Employes who have one (1) or more years of continuous service as of January 1 (except for new employes provided for below) will be granted vacations during the calendar year January 1 to December 31, provided they have worked a minimum of one hundred fifty (150) days during the preceding year."[3]

"51. Length of Vacation. Subject to qualifying in accordance with Paragraph 50:

(a) and (b)[4]

(c) An employe will be entitled to two (2) weeks' vacation with pay in the calendar year in which he will complete three (3) years of continuous service and in each calendar year thereafter to and including

[3] The other portion of this paragraph is not relevant herein.

[4] The other portion of this paragraph is not relevant herein.

the calendar year in which he will complete nine (9) years of continuous service.

(d) An employe will be entitled to three weeks' vacation with pay in the calendar year in which he will complete ten (10) years of continuous service and in each calendar year thereafter to and including the calendar year in which he will complete nineteen (19) years of continuous service.

(e) An employee will be entitled to four (4) weeks' vacation with pay in the calendar year in which he will complete twenty (20) years of continuous service and in each calendar year thereafter."

The District Court did not consider, or at least did not comment, on Paragraphs 49 and 51. The Sixth Circuit cited in its opinion verbatim Paragraph 49 and considered all the paragraphs.

C

Continuous Service Dates of Employees

Exhibit I to the Complaint lists the names of 125 employees making claims. This exhibit lists the continuous service date of each employee and his number of continuous service years as determined by Paragraph 49 of the Contract. The information on this exhibit was posted by the Company, and there was no objection as to its accuracy. The continuous service years of the employees range from four years for the most junior employee to forty years for the most senior employee.

D

Errors of District Court in Applying Contract Language

Petitioner cites at length from the three-page affidavit of Fred A. Peterson, a Company affiant (App., pp. 13a, 14a, 15a). In fact, this is the only evidence other than contracts referred to by Petitioner.

This affidavit, with one exception,[5] was charged by Respondent to be false or at least containing erroneous conclusions. On a Motion for Summary Judgment, conclusions are not to be accepted.[6] For example, Mr. Peterson makes oath that when January 1 was inserted into the contract in 1960, "the 'anniversary date' has thus become January 1". (App., p. 15a.) A mere reading of Paragraph 49 shows this statement is erroneous.

In a further effort to have the Court to focus its attention to January 1, Mr. Peterson states he was personally present in the Lookout negotiations in 1959 and the Union requested the same vacation pay provisions as in the just negotiated Master Agreement and the Company acceded to the Union request. The District Court could have been misled for the inference is that the contract language of the Lookout contract is the same as the master contract. Master contracts were made exhibits to Peterson's deposition and show that much of the contract language of the Master contract as compared to the Lookout contract is entirely different. For example, the master contract negotiated just before the Lookout contract has specific language to govern employees in a situation similar to the employees herein involved. If working under a master contract these employees would be specifically covered, or not covered, under either 14.8 (App., p. 20a) or 14.10 (App., p. 22a). These provisions relating to layoffs, disability, quit, discharge or death were also geared to January 1. The Lookout contract does not contain such clauses.

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[5] The exception was affiant stated the purpose of the change in adding January 1 to the collective bargaining agreement was for Company administrative purposes to which the Respondent agreed. This evidence is discussed more fully hereinafter in this brief.

[6] **Union Insurance Society of Canton, Ltd. v. William Gluckin & Co.**, 353 F. 2d 946 (2nd Cir. 1965). This case was cited by Petitioner for other reasons.

The District Court in its Memorandum Opinion quoted at length from Mr. Peterson's affidavit and from another affiant of the Company, William C. Campbell (App., pp. 80a, 82a). On the Petition to Reconsider, the District Court, without changing its decision, appears to back away from these affidavits and stated "the ultimate conclusion reached by the Court was based primarily upon the contract language as agreed to by the parties" (App., p. 102a).

Once the false premise January 1 was the anniversary date of each employee, the District Court's attention was focused to January 1 by Petitioner's briefs.[7] The Petitioner emphasized "continuous service" as defined in Paragraph 48. Instead of considering "one or more years of continuous service" which the employee would complete in the calendar year prior to January 1, the Petitioner insisted the language be read by omitting "one or more years" as if all the words were "continuous service as of January 1". The Petitioner then argued this continuous service was broken on September 18 when the employees were separated from the Company.

The District Court apparently accepted this argument as in its Memorandum the Court emphasizes "continuous service as of January 1" (App., p. 87a). As previously contended, the District Court seems to have overlooked Paragraphs 49 and 51 of the Lookout contract. At least there was no comment on these paragraphs. Paragraphs 48, 49, 50 and 51 when read together are clear and free from ambiguity. All of the employees herein had the amount of vacation due fixed by Paragraphs 51 (c), (d) and (e) of the Lookout agreement. By September 18, 1966, 87 employees had gained one more year of "continuous

[7] At the request of the Petitioner all briefs in the District Court were made part of the record. All briefs in the Court of Appeals were requested to be filed in this Court by Petitioner.

service''; as their anniversary dates fell between January 1, 1966, and September 18, 1966; 38 employees still had the same number of continuous service years as in the previous year as their ''Anniversary Dates'' fell after September 18, 1967. Paragraph 51 (c), (d) and (e) specifically provide for such continuous service in the calendar year which the employee completes such service and ''in each calendar year thereafter''. Thus all the employees had fully qualified or earned their 1966 vacation by having one or more years of continuous service and working for 150 days.

It was, and is, the position of the employees they had fully earned their vacation pay and only the time of receiving same, January 1, 1967, was deferred. To illustrate, we turn to the actual case of the junior employee, Forest Kelley (Exhibit 1 of Complaint; Transcript). Mr. Kelley obviously went to work late in 1961 or early in 1962. After he completed his training or probationary period, he gained departmental seniority on March 12, 1962. March 12, 1962 is his ''continuous service date'' and this date is posted. After working one year thereafter, March 12, 1963 would be his ''anniversary date''. When Mr. Kelley was permanently laid off or terminated on September 18, 1966, his last anniversary date was March 12, 1966. Paragraph 51 (c) provides an employee will be entitled to two weeks' vacation pay in the calendar year in which he will complete three years of continuous service and in each calendar year thereafter until he completes nine years of such service.

Mr. Kelley, on March 12, 1966, completed four years of continuous service and in that year, 1966, he worked the required 150 days. As previously stated, Paragraph 51 also was perhaps overlooked by the District Court. However, as that may have been, is not Mr. Kelley entitled to two weeks' vacation within the plain meaning of the con-

tract since he completed the required years and worked the required number of days in 1966?

It is respectfully submitted the claims of the employees are a perfect example of the rationale of the decision in **Re Wil-low Cafeteria,** 111 F. 2d 429 (2nd Cir. 1940), wherein that Court said:

> "The consideration for the contract to pay for a weeks vacation had been furnished, that is to say, one year's service had been rendered prior to June I, so that the week's vacation with pay was completely earned and only the time of receiving it was postponed."

E

History of Lookout Pay Provisions

Prior to 1960, vacations were granted on a continuous service year rather than a calendar year. Any employee with one or more years of continuous service could take their vacation after working the required number of days (then 185 days) by their anniversary date. Most employees could take their vacation from three to five months in advance of their anniversary date depending on the number of years of continuous service. It was perfectly clear that had the wording of contracts prior to 1960 had not been changed all the employees involved herein would have been entitled to the vacation pay sought herein under a provision such as 14.11 (d)[8] (App., p. 97a).

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[8] 14.11 Vacation Period—(d) Employees who may be entitled under paragraph (b) or (c) above to take their vacation in advance of their Anniversary Date shall, if they become disabled or laid off during the three or five month period, whichever is applicable, be entitled upon request to receive their vacation pay at the time of such disability or layoff.

Why was January 1 inserted into the contract? The only evidence of Petitioner before the District Court was the affidavit of Peterson that the Company was having difficulty in administering vacations because the anniversary dates, especially the pre-anniversary dates, of the employees were different. It can be reasonably argued that the Company desired to place all the vacations in the following year, and they were merely postponed for administrative purposes. The Respondent's affiant, F. L. Tate, replied:

> "The purpose of eliminating this Clause was, as Mr. Peterson states, merely to have an uniform time in taking vacations and all vacation periods were merely postponed until after January 1."

The employees have never had more than one vacation in a calendar year, and when the change was made for 1960 and thereafter, it was expressly provided there could only be one vacation in a calendar year. There is not a scintilla of evidence the employees were changing the anniversary date to January 1 as the Company's affiant, Peterson, contended and Petitioner now contends.

By consenting to change the date when vacations could be taken, there is no evidence the employees were giving up the rights they had earned at the bargaining table. This history clearly shows that only the time for taking the vacation was postponed.

The District Court did not consider or at least there was no comment on this relevant past history of the Contract and Negotiations. The Sixth Circuit considered this history along with the language of the contract in question and other factors. The Sixth Circuit found that January 1 was not the "anniversary date" of the employees and the insertion of said date was not a material nature, but one of administrative convenience to Petitioner.

F

Industrial Practice

The Petitioner contends the Sixth Circuit ignored relevant industry's practices and experiences. Petitioner states it closed a number of plants after September, 1959, all of which were subject to the vacation pay provisions contained in the master agreement which in turn were identical to those contained in the Lookout agreement. It states that at each instance, the International did not object.

In one of Respondent's affidavits it was stated Respondent was a completely autonomous self-governing union. That it negotiated its own contracts with the Lookout Company. Respondent had absolutely no knowledge of the contracts in Texas, Massachusetts, New Jersey or any other state. Respondent denied these contracts had identical vacation provisions. Further, Respondent stated it had no knowledge as to how the Company unilaterally administered these contracts as the same was never communicated until after the lawsuit was filed herein (App., pp. 95a, 100a, 101a). The Petitioner did not deny any of these statements. Of course, Respondent could not be bound by contracts in which it did not participate or have any knowledge thereof.

One of the Petitioner's affiants, William C. Campbell, swore the language in the Master's contract, the Texas contract, Iowa contract and Kansas contract were identical (App., pp. 40a, 41a and 42a). The District Court observed in its Memorandum Opinion that "Mr. Campbell avers that the vacation pay clauses being identical to those contained in the Lookout contract were administered exactly the same as in the instant case" (App., p. 81a). Again, the District Court was mislead, or could have

been mislead, as much of the language in those contracts is not identical or reasonably similar.[9]

Respondent in reply in its Petition to Reconsider submitted the arbitrator's decision of Professor Archibald Cox in the case of **Telescope Folding Furniture Co.**, 49 LA 837 (1967), as well as **Statistics on Industrial Practice** as gathered by the Bureau of National Affairs, Inc. Professor Cox emphasized that industrial practice was contrary to that which Petitioner contends.[10] It was specifically pointed out in **Telescope Folding Furniture** for a union to be bound by the practice of its employer, it must participate in such practice.

The District Court did not consider at least there was no comment by the Court on settled industrial practice.

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[9] Paragraph 14.8 (App., p. 47a) of the Master Contract governs vacations during layoffs and disability which is geared to January 1. Paragraph 14.10 (App., p. 49a) covers the situation when an employee quits, is discharged or in the event of death which is also geared to January 1. The Texas contract contains Paragraph 50 (App., p. 48a) similar to 14.10 of the Masters' Contract and Paragraph 52 (58a) similar to 14.10 of the Masters' contract.

* * * * * * *

The other contracts introduced by Petitioner contained the following clauses. The Massachusetts contract has Paragraph 49 (App. p. 63a) similar to 14.8 of the Masters' contract, and Paragraph 52 (App., p. 65a) similar to 14.10 of the Masters' contract. The New Jersey Contract has Paragraph 7 (App., p. 71a) similar to 14.8 of the Masters' contract, and Paragraph 9 (App., p. 73a) similar to 14.10 of the Masters' contract.

The Lookout Agreement does not have such clauses.

[10] In **Telescope Folding Furniture Co.** at pages 838 and 839, Professor Cox stated:

> "Nevertheless, I must conclude that the particular contract before me was intended to have the meaning given to similar vacation clauses by settled industrial practice, unless there is some evidence of a contrary intention. * * * Here, however the question is governed by the words of the contract and, read in the light of industrial practice, they are unambiguous. * * * In any event, the inferences to be drawn from these clauses are not strong enough to overturn the well-settled principles that prevail in industry generally under this form of vacation agreement."

G

Pro Rata Vacation Not Involved

The District Court was of the opinion Respondent was seeking a pro rata share of the vacation pay (App., pp. 83a, 88a). The Respondent in its pleadings or briefs never made such contention. Respondent took the position at all times the vacation pay was fully earned at the time of the layoff.

The District Court using the common law approach compares the express pro rata provisions for retiring employees and concluded since there was an express provision for retiring employees, the parties did not intend to have pro rata benefits for vacation pay for other employees (App., pp. 88a-90a).

In all due respect to the learned District Court, it is respectfully submitted that it would be impossible to have a pro rata question. A study of the two requirements for vacation pay show one requirement was to work 150 days in a calendar year; the other requirement was to have "one or more continuous years". The latter requirement merely determines the number of weeks of vacation the employee is entitled after working the 150 days.

The only way possible to have had a pro rata question would be had the plant closed when the employees had worked less than 150 days. For example, if the employees had worked just 50 days and were claiming one-third vacation pay, the question would have been involved.

The Company had compulsory retirement at the age of 65 be it whatever quarter of the year when the employee became 65. This provision for retiring employees is based on a pro rata basis of 150 days. That is, 38 days a quarter or roughly one-fourth of the required 150 days. For all other employees, they had to work 150 days to fully earn their vacation pay.

Perhaps the District Court arrived at its conclusion for the reason that Court seemed to be of the opinion the "continuous service year" was the same as a "calendar year". Be that as it may, a pro rata vacation question is not involved and cases cited by Petitioner on the question of pro rata vacations are not in point.

H

Synopsis of District Court Decision

It is respectfully submitted the District Court was first mislead by the affidavits submitted by Petitioner. The District Court did not consider the following relevant factors: 1. The previous negotiations and history of the contract at the Lookout plant, 2. Relevant industrial practice.

On the Petition to Reconsider, the District Court stated it decided the case primarily on the contract language (App., p. 102a). Yet, the District Court did not consider two of the most important defining sections, Paragraphs 49 and 51, to interpret Paragraph 50.

The District Court was of the opinion the Respondent was seeking a pro rata share of the vacation pay. The Respondent never made such contention. Respondent took the position at all times the vacation pay was fully earned at the time of the layoff.

The District Court mentioned several cases of this Court to be used as guidelines. These cases had been suggested to the District Court by Respondent in its original brief. The District Court, instead of following said cases and the governing body of Federal law, turned to State law especially the 1952 Michigan decision of **Treigar v. Steggeman**, 339 Mich. 166, 52 NW 2d 647, and the 1965 Missouri decision of **Brackett v. Easton Boot and Shoe Co.**, 388 SW 2d 842. The Brackett case involved a pro rata question.

THE SIXTH CIRCUIT'S OPINION

The Sixth Circuit immediately recognized governing Federal law which must be followed. The Sixth Circuit cited the decision of Professor Archibald Cox of **Telescope Folding Furniture Co.** (1967), 49 LA 837. This arbitration decision is a complete brief on the subject matter. Professor Cox states the leading case from which labor arbitrators developed their rule was the Second Circuit decision in **Re Willow Cafeteria**, 111 F. 2d 429 (C.A. 2, 1940). The rule followed by labor arbitrators is that vacation pay is deferred wages unless there is a specific contrary intent. Professor Cox at Page 838 emphasized: "The arbitrator cannot ignore the omission of such critical words". The Sixth Circuit observed it had followed **Re Willow Cafeteria** in the following cases: **Smith v. Kingsport Press, Inc.** (1966), 366 F. 2d 416, and in **Hue v. E. I. Dupont deNemours & Co.** (1963), 324 F. 2d 546.

The Sixth Circuit carefully considered the past history of the Lookout contract and commented in detail concerning the same. By citing **Telescope Folding Furniture Co.**, it recognized established industrial practice.

The Sixth Circuit considered and analyzed the various sections of the contract, quoting verbatim Paragraph 49. Based upon all factors, the Sixth Circuit came to a different legal conclusion than the District Court.

The Sixth Circuit after reaching its conclusion that all employees had earned vacation pay, then considered that under a strained interpretation, in view of past bargaining history, its conclusion might not benefit those workers who had not reached their individual anniversary dates. The Court obviously had in mind the 38 employees who had not reached their anniversary dates. Such an employee was Charles Strickland with 32 years of continuous

service whose anniversary date fell on September 20, two days after his termination.

The Sixth Circuit to remove any doubt about these employees relied in part on the general rules of contract law. Whereas, this Court has stated a collective bargaining agreement is not an ordinary contract nor is to be governed by old common law concepts, it is respectfully submitted this Court has never gone so far as to hold that in a novel situation one cannot consider such common law along with all other factors. The Petitioner cannot argue against the equity of the decision of the Sixth Circuit. In essence, the Petitioner seems to ask this Court to reverse because the Sixth Circuit considered ordinary contract law on this one issue. It is respectfully submitted that on occasions, while application of ordinary contract rules should be guarded, nevertheless, they may be useful. It would appear the only alternative on novel issues would be that the Court declare a new concept. In any event, the Sixth Circuit, in addition to general contract law on this issue, relied on decisions of labor arbitrators and in particular, the decision of the labor arbitrator in **Mays Landing Water Power Co.**, 12 LA 1261. The Petitioner cites no authorities to the contrary.

Respondent respectfully submits that even under a strained interpretation of past bargaining, the above issue is never reached. Prior to 1960, the contracts which Petitioner introduced show as in Paragraph 14.11 (supra), that in case of layoff, if the employee was within three to five months of his anniversary date (whichever was applicable), he received the vacation pay. The working days required were then 185 days or roughly 9 months of a working day year. Under any of the old contracts, it was not necessary for the employee to reach his anniversary date. As the Respondent's affiant, F. L. Tate stated:

"I agree with the affidavit of Fred A. Peterson that prior to 1959 an employee could take his vacation before the Anniversary Date" (App., p. 96a).

The employees claim the "continuous service year" is merely a provision fixing the number of weeks for various benefits to which an employee was entitled. The same formula was used to determine the number of weeks for disability and retirement benefits. The formula was used for the separation allowance as provided in Paragraph 90-92 (App., pp. 109a, 110a). The Company had no difficulty in determining these continuous service years for separation benefits. There is no difficulty for vacation pay.

Lastly, it should be pointed out the Sixth Circuit did not reject Respondent's further contention that Paragraph 54 (App., p. 107a) is also controlling. The Sixth Circuit did not reach this contention. Paragraph 54 provided the employee, in event of layoff, was entitled to "earned vacation." Paragraph 54 is a peculiar provision which is not contained in any contract submitted by Petitioner. Keeping in mind this paragraph had been in all previous Lookout contracts, wherein the employees could take their vacation within three to five months of their individual anniversary dates, that 185 working days were required; further considering there has always been a special provision for first year employees, one can only ask what was the purpose of Paragraph 54 for those employees with more than one year of continuous service except that a vacation was earned by working the required days?

REASONS FOR DENYING WRIT

The Decision of the Sixth Circuit is Correct

Federal Law

This Court has held one of the primary goals of Federal labor law is the promotion of industrial peace and this goal necessarily requires a uniform body of federal common law to insure certainty in the collective bargaining process. **Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.** (1962), 369 US 95.

Even before the decision in **Lucas Flour Company**, labor arbitrators had turned to the second Court's decision of **Re Wil-low Cafeteria** (supra), to develop a uniform rule. That rule has been followed almost uniformly by labor arbitrators and the lower Federal courts. Typical of a District Court decision prior to the Sixth Circuit's decision in the instant case is that of Chief Judge Freeman of the Eastern District of Michigan in the case of **International Union, U.A.A. & A.I.W. v. Aluminum Alloys Corp.** (1970), 310 F. Supp. 213. In this case, Judge Freeman said:

> "The Court of Appeals for this circuit, considers vacation pay to be deferred wages unless a specific contrary intent is found within the terms of the contract."

The Sixth Circuit in approving the labor arbitration decision of **L. Hyman Co., Inc.**, 13 LA 803, and **Telescope Folding Furniture Co.** (supra), and other arbitration decisions recognized this general rule of labor arbitrators. The case of **L. Hyman Co., Inc.**, was decided by Mr. Robert P. Brecht who at the time held the chair as professor of industry, University of Pennsylvania, an author of well-known and generally accepted books on labor-management

relations. Professor Brecht used the same approach as Professor Cox.

The opposite rule as developed by some State courts in old cases was based on the common law rule, What is the intent of the parties as generally expressed in the language used? This was the approach of the District Court. The District Court did not hesitate to say its decision was based primarily on the language of the contract. The District Court, had it considered all the relevant contract provisions, could have reached the same result as labor arbitrators even under the common law rule. As previously stated, the District Court was of the opinion the Respondent was seeking pro rata vacation pay. Had the District Court applied the rule of labor arbitrators and the lower Federal courts, the District Court decision would necessarily have been just the opposite. In the Lookout contract, there are no critical words which specifically state the employees must be working on January 1.

The Lookout contract provided for voluntary arbitration rather than compulsory arbitration. In view of the decisions of the overwhelming majority of eminent arbitrators, one can only ask, is this not the reason the Petitioner refused to permit this case to go to final arbitration?

As Professor Cox observed in **Telescope Folding Furniture** at Page 840: "It is necessary, however, to have a rule one way or the other." It is respectfully submitted that in the event this Court were to reverse the Sixth Circuit, instead of having industrial peace, only chaos would result.

Tennessee Law

If any State law is to be considered, it is respectfully submitted that only the law of the State of Tennessee should be considered. All Lookout contracts were executed in the State of Tennessee. This Court has stated, State

courts have concurrent jurisdiction but must apply applicable Federal law. Tennessee law may have some significance in view of the fact this Court has stated the contract must be read as a whole and in the light of the law relating it to when made. **Mastro Plastics Corp. v. NLRB**, 350 US 270 (1956). Of course, the Lookout contract was made when Tennessee law had been superseded by Federal law but one might argue that the prior contracts had been made when Tennessee law was applicable.

The Tennessee Supreme Court in 1957 had the exact issue involved herein before it. In regard to contract interpretation, it is infrequent that you have a previous decision almost identical as to controlling facts and contract language. Such is the case of **Textile Workers Union of America v. Brookside Mills** (1957), 203 Tenn. 71, 309 SW 2d 371. In this case, the employees were terminated prior to June 1, 1956, and the Company argued "continuous service" meant the employees must be in the employ of the Company as of June 1, 1956. The pertinent provisions of that contract is perhaps more similar to the one involved in the Lookout contract than any other case cited to this Court by either party. The Brookside Mills contract provided in part as follows:

> "Section 1. All employees who on June 1, 1950, and June 1 of each succeeding contract year, have continuous service with the employer will be paid vacation pay according to the following schedule."

The Tennessee Supreme Court noted it had several authorities submitted to it but did not reveal the authorities. It is respectfully submitted they could have been only those of labor arbitrators. The Tennessee Supreme Court held the contract did not have specific language stating to the effect "all who are employees on June 1", but the contract stated, "all employees who on June 1"; "nor does the contract require that service be continuous up to June

1 or some similar expression." The Tennessee Supreme Court then stated:

> "If, therefore, in the face of this ambiguous language we should hold that an employee who has put in at least 6 months continuous time may be deprived of his vacation pay by being permanently terminated by the employer a few days short of the date of June 1 through no fault of the employee, then we would be reading into the contract a provision for a forfeiture which does not exist."

The Tennessee Supreme Court case is cited in most textbooks as the leading decision on the words, "continuous service." Thus, it is seen that under applicable Federal law, even considering the law of the State of Tennessee, the decision of the Sixth Circuit is correct.

REPLY TO FOUR REASONS ADVANCED BY PETITIONERS TO GRANT THE WRIT

I

Sixth Circuit Decision Is Not in Conflict With the Decision of Any Other Circuit.

Petitioner relies principally on the decision of the Seventh Circuit in the case of **Local Lodge 2040, International Association of Machinists, AFL-CIO v. Servel, Inc.**, 268 F. 2d 692 (7th Cir.), cert. den., 361 U.S. 884 (1959). If Petitioner felt this case was important or even in point, it seems likely it would have called this decision to the attention of the Courts below in its briefs.

In **Local Lodge 2040**, the principal questions before the Seventh Circuit are foreign to the instant case. The Seventh Circuit was not concerned with facts showing an earned or vested right. A vacation claim was briefly discussed toward the end of that decision. The Seventh Circuit merely approved the District Court's holding that no employee was entitled to payment in 1958 because no such person was an employee with seniority on January 1 as specifically required by Section 237 of the agreement. This holding is in accord with the Sixth Circuit decision and that of labor arbitrators.

The other Circuit Court decisions cited involve the right of an employer to terminate its business with the holding that rights not earned or vested do not survive. In the footnote at the bottom of Petitioner's brief, Page 17, in referring to this Court's decision in **Textile Workers Union of America v. Darlington Mfg. Co.**, 380 U.S. 263 (1965), it is stated "this right is, of course, subject to the employer satisfying all obligations which were vested at the time of termination". Respondent agrees with this statement. Petitioner then adds, "As noted, however, we

are not here dealing with vested rights, but, rather, rights which were concededly non-vested". No one has conceded the earned vacation pay involved herein is non-vested as Petitioner contends. It is just to the contrary.

It is quite obvious from reading the decision of the labor arbitrator in the case of **H. K. Porter Co.**, 49 Lab. Arb. 147 (1967), the Sixth Circuit gave great consideration to this decision although it is not specifically referred to in its opinion. This case was decided by Sidney L. Cahn, the former U. S. Commissioner of Labor, Panel Chairman of the War Labor Board and chairman of several presidential fact finding commissions. In **H. K. Porter Co.**, the arbitrator had before him facts very similar to the instant case. Using a typical arbitrator's approach, he held that deferred compensation for services rendered is a "vested right".

Petitioner discusses at length the Second Circuit decision of **Zdanok v. Glidden Co.**, 288 F. 2d 99 (2d Cir.), cert. den. on this issue, 368 U.S. 814 (1961). Petitioner states the decision was so unfavorable, the Second Circuit sitting **en banc** overruled Zdanok in **Local 1251 Int. U. of U.A., A. & A.I.W. v. Robertshaw Controls Co.**, 405 F. 2d 29 (2d Cir. 1968).

In reading the **Robertshaw Controls Co.** decision, the Second Circuit states its first ruling in Zdanok was so unpopular that labor arbitrators would not follow it. In reversing, the Second Circuit relied upon the Sixth Circuit's decision in the case of **Oddie v. Ross Gear and Tool Co.**, 305 F. 2d 143, cert. den. 371 U.S. 941 (1962). The Second Circuit then held in the last complete paragraph of its decision, "If rights are to persist beyond the term of the collective bargaining agreement, the agreement must so provide or be susceptible of such construction". This is exactly what the Sixth Circuit held in the instant case.

II

The Sixth Circuit Used as Guidelines the Decisions of This Court.

The discussion heretofore under the topic, "Sixth Circuit Decision", is a complete answer to Petitioner's argument. As pointed out, the Sixth Circuit considered (1) all the terms of the agreement; (2) the history of the Lookout agreement and past negotiations; (3) established industrial practice; (4) the law as developed by labor arbitrators and the lower Federal courts.

III

Interpretations by State Courts in Old Decisions Do Not Warrant a Review by This Court.

Respondent agrees with Petitioner that this Court has stated one of the primary goals of Federal labor law is the promotion of industrial peace and requires a uniform body of Federal common law. **Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Company,** 369 U.S. 95, 103-104 (1962). Petitioner again restates the Seventh Circuit case of **Local Lodge 2040** (supra). Actually, most of the cases cited by Petitioner are in accord with the law as found by the Sixth Circuit but involve different facts. The Wisconsin decision of **Briggs v. Electric Auto-Lite Company,** 37 Wis. 2d 275, 144 N.W. 2d 32 (1967) and the Missouri decision of **Brackett v. Easton Boot and Shoe Company,** 388 S.W. 2d 842 (1965), are concerned with the issue of "pro rata vacation" which has been previously shown is not herein involved.

In the **Briggs** case, the employees conceded they had not met the terms of the contract by working the required

twelve months but desired a pro rata vacation based upon the months they had worked. The agreement before the Wisconsin Court specifically granted the benefits only "provided employee was in active employ on Dec. 31". The decision is in accord with labor arbitrators and lower Federal courts. In **Brackett v. Easton Boot**, the employees also recognized they had not earned their vacation pay and sought a pro rata portion for the period they had worked. The same pro rata contention was also before the arbitrator in the case of **Hillman Transportation Co.**, 46 Lab. Arb. 509 (1966).

In the 1956 New Jersey case, **Botany Mills v. Textile Workers Union**, 42 N.J. Super. 327, 126 A. 2d 289 (1956), the result would be the same if the rule of labor arbitrators was applied. In the 1956 Ohio case, **International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. L. T. Patterson Co.**, 8 Ohio Op. 2d 334, 159 N.E. 2d 923, aff'd per curiam 159 N.E. 2d 917 (1956), appeal dism'd, 166 Ohio St. 148, 140 N.E. 2d 318 (1957), the same result would occur as the agreement provided no vacation benefits "unless he (the employee) was in the employ of the Company on April 15". A typical approach is used by the labor arbitrator in **Oldberg Manufacturing Co.**, 51 Lab. Arb. 509 (1968) by considering the history of the agreement and the negotiations.

In **Trelor v. Steggeman**, 333 Mich. 166, 52 N.W. 2d 647 (1952), the State court found there was a definite prescribed condition that the employees be working on a certain day. Arbitrators follow this rule under such facts. As Professor Cox stated in **Telescope Folding Furniture Co.**, supra, in regard to the rule followed by arbitrators "only a small minority of the cases are opposed to this conclusion and most of them rest upon peculiar facts". Such are the cases cited by Petitioner.

IV

Petitioner Not Deprived of Due Process of Law.

In Petitioner's footnote, Page 27, Petitioner concedes the issue of Due Process of Law was not raised in the lower courts. It is respectfully submitted for the Court to consider this issue for the first time would be contrary to Rule 23 (1) (f) of this Court.

Petitioner argues that when the case was initially decided, petitioner's affidavits as to the primary purpose of changing the language of the contract was not controverted. This alleged purpose in the affidavits was merely a conclusion of Petitioner, and conclusions are not to be considered on a Motion for Summary Judgment. In Respondent's reply brief in the District Court, the statements of Petitioner were merely inferred to as conclusions since Respondent was of the opinion these erroneous conclusions would be noticeably outstanding. In the Petition to Reconsider before the District Court, these conclusions were denied by Respondent's affidavit.

The only possible conclusion that would be permissible would be the one conclusion to which Respondent agreed, which was the Petitioner merely desired to postpone vacations for administrative purposes. Had the contract not been changed for the convenience of the Company, every employee involved hereto would clearly be entitled to vacation pay under the wording of the former agreements.

Petitioner has not cited any facts overlooked. The Sixth Circuit simply came to a different legal conclusion based upon the facts than the conclusion of the District Court. It is respectfully submitted that Petitioner had its day in Court.

CONCLUSION

It is evident from the foregoing reasons there is no merit in the Petition for a Writ of Certiorari in this cause. Therefore, it is respectfully prayed that the Writ of Certiorari be denied.

Respectfully submitted

S. DEL FUSTON
522 Maclellan Building
Chattanooga, Tennessee 37402
Telephone: (615)-266-6423
Attorney for Respondent

or compensation and that the right to receive same is entirely dependent upon contract." The Court held under the facts of that case that the language of the collective bargaining agreement was not "free of ambiguity" in that 1) the contract did not provide that "all who are employees on June 1" but rather stated "all employees who on June 1, . . ." 2) the contract failed to define "continuous service." Based upon these ambiguities the Court concluded that by depriving these employees of their vacation pay it "would be reading into the contract a provision for a forfeiture," which did not exist. Accordingly, the Court affirmed the Chancellor finding that the employees were entitled to recover vacation pay from July 7, 1955, to the date of their discharge.

The contract in the instant case provides explicitly for "continuous service." Section XI, paragraph 48, states:

> An employee's continuous service for vacation purposes shall be deemed to begin with his Continuous Service Date (as defined in Paragraph 49) and shall be broken when an employee has quit, or has been discharged, or has remained in a status of layoff for a continuous period of two (2) years, *or has otherwise separated from Company's employment.* If an employee whose Continuous Service has been broken is later re-employed, he will thereafter, if retained in the Company's employment, establish a new Continuous Service Date in the same manner as other newly hired employees. (Emphasis supplied)

Further, Section XI, paragraph 50, describes the "Qualification for Vacation" in the following terms:

> a) Vacations for all employees will be granted on a calendar year basis in accordance with the following eligibility requirements.
>
> 1) Employees who have one (1) or more years of *continuous service as of January 1* (except for

new employees provided for below) will be granted vacations during the calendar year January 1 to December 31, provided they have worked a minimum of one hundred fifty (150) days during the preceding calendar year . . .

2) A new employee shall become eligible for his first vacation with pay upon his first anniversary date provided he has worked a minimum of one hundred fifty (150) days during his first anniversary year, counting as days worked those set forth in Item (1) above. *On the following* January 1, he shall be eligible for a vacation with pay in accordance with the provisions as set forth in Item (1) above. (Emphasis supplied)

Finally, Section XI, paragraph 52, specifies the means by which vacation pay is to be computed.

Vacation pay for each week of vacation which an employee is entitled to receive shall be computed by determining *the total money earned from January 1 (of the year in which the vacation is taken)* through the last payroll week completed prior to the date of the vacation and dividing that sum by the number of weeks worked since said January 1 through such payroll week . . . (Emphasis supplied)

It is to be noted further that Section XI, paragraph 59(a) provides as follows:

Employees retiring pursuant to the compulsory retirement provisions of paragraph 67(a), shall be granted a pro rata portion of the amount of vacation described in paragraph 51, computed as follows:

For each period of three (3) consecutive months (from January 1 of the year in which the employee retires to date of retirement) in which the employee

> works a minimum of thirty-eight (38) days, he shall be granted one-fourth (¼) of the amount of vacation described in paragraph 51. Such pro rata vacation shall be in addition to the vacation, if any, for which the employee qualified as of the preceding December 31.

This contract provision is most significant in that it indicates clearly that the parties contemplated and negotiated upon the subject of pro rata vacation pay for those employees terminated by reason of retirement. If, as plaintiffs appear to contend, vacation pay accrues as additional wages and these employees are entitled to their accrued vacation pay by reason of the fact that they have accrued such pay by working 150 days, then it would appear that Section 59(a) of Article XI is superfluous. If the plaintiff's interpretation of the contract provisions regarding vacation pay is accepted, a retiring employee with 150 days of service in 1966 would be entitled to full vacation pay without further provision therefor in the contract. However, the contract specifically provides that retiring employees are to receive a pro rata portion of their vacation pay based upon 38 days work for each three month period from January 1 of the year of retirement to the date of retirement, thus specifically excluding retiring employees from the January 1 eligibility date. No other class of employees is so excluded from the "continuous service" requirement. This provision of the contract would indicate an intention to exclude only retiring employees from the "continuous service" requirement of the contract and from the "January 1" eligibility requirement. See *Brackett* v. *Eastern Boot & Shoe Co.*, (Mo. 1965) 388 S.W. 2d 842.

The plaintiff also relies upon paragraph 54 in support of its position. This paragraph provides:

> Employees who have earned vacations under this vacation plan, but who may become sick, laid off by

management, or injured prior to the date selected for their vacation pay, upon request to the management shall receive their vacation."

It would seem that this provision, applying, as it does, only to "employees who have earned vacations," is consistent with the contract interpretation that the employees meet the January 1 employment eligibility requirement for obtaining vacation pay.

Applying the general principles heretofore outlined by the Court to the contract provisions in the instant case, it appears clear that the parties contracted that two conditions precedent must exist in order for an employee to be eligible for vacation pay, that is, (1) that the employee have worked a minimum of 150 days during the preceding year, and (2) that the employee was employed upon January 1 of the calendar year during which the vacation is to be taken. The language of the contract appears clear and free from ambiguity in this respect.

Accordingly, the plaintiff's motion for summary judgment will be denied and the defendant's motion for summary judgment will be granted. An order will enter sustaining the defendant's motion and dismissing the lawsuit.

FRANK W. WILSON
United States District Judge

* * *

Order

This is an action instituted pursuant to § 301 of the Labor-Management Relations Act (29 U.S.C. § 185) for the recovery of vacation pay allegedly due unto employees of the plaintiff's union under a collective bargaining agreement. The case is before the Court upon cross motions for summary judgment. Having considered the respective motions, the record in the case, and the briefs of the parties, and for the reasons set forth in a memorandum

opinion filed herein, the Court is of the opinion that the plaintiff's motion for summary judgment should be denied, that the defendant's motion for summary judgment should be sustained, and that this lawsuit should be dismissed.

It is accordingly ORDERED that the plaintiff's motion for summary judgment be and the same is hereby denied. It is FURTHER ORDERED that the defendant's motion for summary judgment be and is hereby sustained. It is FURTHER ORDERED that this lawsuit be and the same is hereby dismissed.

APPROVED FOR ENTRY.

FRANK W. WILSON
United States District Judge

ATTEST:
A true copy.
Certified this 10-20-70

Earl D. Saulpaw, Jr., Clerk
By Bertha Morgan
Deputy

APPENDIX C

Order

This case is before the Court upon the plaintiff's motion seeking reconsideration of the Court's prior order denying the plaintiff's motion for summary judgment and dismissing the lawsuit. The plaintiff contends in support of its motion that the Court erred in basically two respects:

1) in attaching undue weight to certain affidavits submitted by representatives of the defendant Company; and

2) in failing to follow the applicable and controlling case law.

In this latter regard, the plaintiff relies heavily upon an arbitration decision, *Telescope Folding Furniture Company*, 49 L.A. 837 (1967), written by Archibald Cox, Professor of Law at Harvard University. However, it should be noted that in this opinion Mr. Cox states:

> "There is no clause stipulating that vacations shall be limited to workers on the payroll, or on the seniority list, or otherwise in the Company's employ, on August 1 or any other particular date. Such clauses are quite common in collective agreements, although they are probably omitted more often than they are included. If there were such a clause in the Telescope contract, the Company's position would be correct. In fact, there is none. The arbitrator cannot ignore the omission of such critical words."

In the instant case, this Court concluded, based upon the specific contract language in the Lookout Oil and Refining Company agreement, that the parties contracted that two conditions precedent must exist in order for an employee to be eligible for vacation pay, that is, (1) that the employee have worked a minimum of 150 days during the preceding

year, and (2) that the employee was employed upon January 1 of the calendar year during which the vacation is to be taken. In reaching this conclusion, the Court outlined the relevant case law, past practices of the Company, and certain principles applicable generally to the construction of collective bargaining agreements. The ultimate conclusion reached by the Court was based primarily upon the contract language as agreed to by the parties. Precedent, past practices, and general principles at most provide the Court with guidelines. "Each labor contract stands on its own feet." See *Telescope Folding Furniture Company, supra.*

Having reviewed the record and having considered the plaintiff's motion, brief and supporting affidavit, the Court remains of the opinion that the former action in dismissing the lawsuit was proper for the reasons stated in the Court's memorandum entered herein. The motion to reconsider will accordingly be denied.

It is SO ORDERED.

APPROVED FOR ENTRY.

FRANK W. WILSON
United States District Judge

ATTEST:

A true copy.

Certified this 11-30-70

Earl D. Saulpaw, Jr., Clerk
By Bertha Morgan
Deputy

APPENDIX D

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. (June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a

summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

Supreme Court, U.S.
FILED
FEB 1 1972
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-788

ARMOUR AND COMPANY,
Petitioner,

vs.

LOCAL UNION NO. 186, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, an Unincorporated Labor Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

S. DEL FUSTON
522 Maclellan Building
Chattanooga, Tennessee 37402
Telephone: (615) 266-6423
Attorney for Respondent

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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ARMOUR AND COMPANY,
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LOCAL UNION NO. 186, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, an Unincorporated Labor Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondent, Local Union No. 186, United Packinghouse, Food and Allied Workers, AFL-CIO, an unincorporated labor association[1] opposes the Petition for Writ of Certiorari.

[1] The style of this case states Respondent is "an unincorporated Labor Corporation". This was obviously a typographical error in the lower Court caption which was overlooked.

Respondent respectfully prays not to review this cause but to deny the Petition for Writ of Certiorari because of the following:

1. The questions presented are foreign to the decision of the Sixth Circuit.

2. The decision of the Sixth Circuit is not in conflict with the decision of another Court of Appeals or of The Supreme Court.

3. The decision of the Sixth Circuit does not involve an important question of federal law which has not been, but should be, settled by the Supreme Court.

4. The decision below turns on its own particular facts and will not affect anyone except the litigants.

5. The decision of the Sixth Circuit in this cause is correct.

The Opinions below and Jurisdiction of this Court are correctly stated by Petitioner.

REPLY TO QUESTIONS PRESENTED BY PETITIONER

In response to the four questions submitted by Petitioner, Respondent would show as follows:

I

The question whether or not the employer closed its plant in good faith and for bona fide business reasons was never raised in this cause or any other legal proceedings.

The question before the District Court and the Sixth Circuit involved facts wherein employees were terminated before the beginning of the year in which vacations were to have been taken. The question under the Collective

Bargaining Agreement was whether or not the employees were entitled to vacation pay for work performed in 1966. The employer contended the employees must be actively employed on the first day of the vacation year.

The employees contended that all the conditions for vacation pay had been fully met, the vacation had been fully earned and only the time of receiving same had been delayed.

II

Question Two should be paraphrased as follows: Was it proper for the Courts below to consider among other factors (A) to apply "general rules of contract law as used by Labor Arbitrators" (B) to look to the specific language of the contract, and (C) to consider relevant industrial practice usage and custom?

III

A counter statement of Question Three is as follows: Should this Court consider the construction of typical vacation eligibility provisions in a collective bargaining agreement when the lower Federal Courts and an overwhelming majority of labor arbitrators are in agreement as to law?

IV

Question Four proposed by Petitioner was never raised prior to this Petition for Certiorari.

Based upon the record, the Sixth Circuit did not make a different "finding" as to facts, but, based upon competent facts, came to a different legal conclusion than the District Court.

REPLY TO STATEMENT OF CASE

As previously stated, the issue of the right of the employer to close its Chattanooga plant was never questioned in the proceedings below.

The Sixth Circuit considered applicable Federal law. There is no conflict between its decision and the decision of another Court of Appeals. The Sixth Circuit followed the guidelines adopted by this Court. The rule followed by the Sixth Circuit is the same as used by labor arbitrators.

Petitioner had its day in Court, and prior to this Petition for Certiorari, never raised the question of Due Process of Law.

PROCEEDINGS BEFORE THE DISTRICT COURT

A

Basic Facts

On September 18, 1966, Petitioner sold its Chattanooga Lookout plant facilities, rather than the plant facilities and collective bargaining agreement, to Swift & Company. Most or all of the employees had received their vacation in the summer of 1966 which had been earned in 1965. When the plant closed, any employee who had not already received this vacation pay for 1965 was then paid. The employees contended they had earned vacation pay in 1966 which normally would have been paid in 1967. When the Petitioner refused payment, Respondent invoked the limited arbitration procedure. When Petitioner refused to permit the case to go to final arbitration as the contract did not provide for compulsory arbitration, this suit was precipitated.

B

Vacation Provisions in Lookout Agreement

It is agreed that Petitioner and the International negotiated master agreements covering large meat-processing plants in the Chicago area. These master agreements were always negotiated in advance of the Lookout Contract.

Respondent is a completely autonomous, self-governing union that negotiated its own contracts. The masters' agreement was used solely as a guide but through the years, the Lookout agreement was altered by wording of various provisions and providing for many additional or different benefits (App., p. 95a). The applicable provisions of the Lookout agreement are as follows:

Paragraph 92 (App., p. 110a) provided that if the employees were separated, they should be paid for any vacation for which the employees had qualified but not taken. Paragraph 54 (App., p. 107a) provided employees who had earned vacations but were laid off by management prior to the date selected for their vacation pay would receive such pay. The contract did not define what was meant by "earned vacations". Other pertinent sections in the Lookout Agreement are as follows:

> "48. Continuous Service. An employe's continuous service for vacation purposes shall be deemed to begin with his Continuous Service Date (as defined in Paragraph 49) and shall be broken when an employe has quit, or has been discharged, or has remained in a status of layoff for a continuous period of two (2) years, or has otherwise separated from Company's employment."[2]

---

[2] The other portion of this paragraph is not relevant herein.

"49. Continuous Service and Anniversary Date. The Continuous Service Date of an employe shall be:

(a) In the case of employes hired hereafter, the employes presently on the payroll who have not as yet established seniority, the date on which the employe first establishes departmental seniority on the plant payroll.

(b) In the case of employes presently on the payroll who have established seniority, the plant service date heretofore in effect and use for determining vacation eligibility for each such employe.

The Anniversary Date of an employe shall mean each anniversary of the employe's last established Continuous Service Date."

"50. Qualification for Vacation:

(a) Vacations for all employes will be granted on a calendar year basis in accordance with the following eligibility requirements.

(1) Employes who have one (1) or more years of continuous service as of January 1 (except for new employes provided for below) will be granted vacations during the calendar year January 1 to December 31, provided they have worked a minimum of one hundred fifty (150) days during the preceding year."[3]

"51. Length of Vacation. Subject to qualifying in accordance with Paragraph 50:

(a) and (b)[4]

(c) An employe will be entitled to two (2) weeks' vacation with pay in the calendar year in which he will complete three (3) years of continuous service and in each calendar year thereafter to and including

[3] The other portion of this paragraph is not relevant herein.

[4] The other portion of this paragraph is not relevant herein.

the calendar year in which he will complete nine (9) years of continuous service.

(d) An employe will be entitled to three weeks' vacation with pay in the calendar year in which he will complete ten (10) years of continuous service and in each calendar year thereafter to and including the calendar year in which he will complete nineteen (19) years of continuous service.

(e) An employee will be entitled to four (4) weeks' vacation with pay in the calendar year in which he will complete twenty (20) years of continuous service and in each calendar year thereafter."

The District Court did not consider, or at least did not comment, on Paragraphs 49 and 51. The Sixth Circuit cited in its opinion verbatim Paragraph 49 and considered all the paragraphs.

C

Continuous Service Dates of Employees

Exhibit I to the Complaint lists the names of 125 employees making claims. This exhibit lists the continuous service date of each employee and his number of continuous service years as determined by Paragraph 49 of the Contract. The information on this exhibit was posted by the Company, and there was no objection as to its accuracy. The continuous service years of the employees range from four years for the most junior employee to forty years for the most senior employee.

D

Errors of District Court in Applying Contract Language

Petitioner cites at length from the three-page affidavit of Fred A. Peterson, a Company affiant (App., pp. 13a, 14a, 15a). In fact, this is the only evidence other than contracts referred to by Petitioner.

This affidavit, with one exception,[5] was charged by Respondent to be false or at least containing erroneous conclusions. On a Motion for Summary Judgment, conclusions are not to be accepted.[6] For example, Mr. Peterson makes oath that when January 1 was inserted into the contract in 1960, "the 'anniversary date' has thus become January 1". (App., p. 15a.) A mere reading of Paragraph 49 shows this statement is erroneous.

In a further effort to have the Court to focus its attention to January 1, Mr. Peterson states he was personally present in the Lookout negotiations in 1959 and the Union requested the same vacation pay provisions as in the just negotiated Master Agreement and the Company acceded to the Union request. The District Court could have been misled for the inference is that the contract language of the Lookout contract is the same as the master contract. Master contracts were made exhibits to Peterson's deposition and show that much of the contract language of the Master contract as compared to the Lookout contract is entirely different. For example, the master contract negotiated just before the Lookout contract has specific language to govern employees in a situation similar to the employees herein involved. If working under a master contract these employees would be specifically covered, or not covered, under either 14.8 (App., p. 20a) or 14.10 (App., p. 22a). These provisions relating to layoffs, disability, quit, discharge or death were also geared to January 1. The Lookout contract does not contain such clauses.

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[5] The exception was affiant stated the purpose of the change in adding January 1 to the collective bargaining agreement was for Company administrative purposes to which the Respondent agreed. This evidence is discussed more fully hereinafter in this brief.

[6] **Union Insurance Society of Canton, Ltd. v. William Gluckin & Co.**, 353 F. 2d 946 (2nd Cir. 1965). This case was cited by Petitioner for other reasons.

The District Court in its Memorandum Opinion quoted at length from Mr. Peterson's affidavit and from another affiant of the Company, William C. Campbell (App., pp. 80a, 82a). On the Petition to Reconsider, the District Court, without changing its decision, appears to back away from these affidavits and stated "the ultimate conclusion reached by the Court was based primarily upon the contract language as agreed to by the parties" (App., p. 102a).

Once the false premise January 1 was the anniversary date of each employee, the District Court's attention was focused to January 1 by Petitioner's briefs.[7] The Petitioner emphasized "continuous service" as defined in Paragraph 48. Instead of considering "one or more years of continuous service" which the employee would complete in the calendar year prior to January 1, the Petitioner insisted the language be read by omitting "one or more years" as if all the words were "continuous service as of January 1". The Petitioner then argued this continuous service was broken on September 18 when the employees were separated from the Company.

The District Court apparently accepted this argument as in its Memorandum the Court emphasizes "continuous service as of January 1" (App., p. 87a). As previously contended, the District Court seems to have overlooked Paragraphs 49 and 51 of the Lookout contract. At least there was no comment on these paragraphs. Paragraphs 48, 49, 50 and 51 when read together are clear and free from ambiguity. All of the employees herein had the amount of vacation due fixed by Paragraphs 51 (c), (d) and (e) of the Lookout agreement. By September 18, 1966, 87 employees had gained one more year of "continuous

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[7] At the request of the Petitioner all briefs in the District Court were made part of the record. All briefs in the Court of Appeals were requested to be filed in this Court by Petitioner.

service"; as their anniversary dates fell between January 1, 1966, and September 18, 1966; 38 employees still had the same number of continuous service years as in the previous year as their "Anniversary Dates" fell after September 18, 1967. Paragraph 51 (c), (d) and (e) specifically provide for such continuous service in the calendar year which the employee completes such service and "in each calendar year thereafter". Thus all the employees had fully qualified or earned their 1966 vacation by having one or more years of continuous service and working for 150 days.

It was, and is, the position of the employees they had fully earned their vacation pay and only the time of receiving same, January 1, 1967, was deferred. To illustrate, we turn to the actual case of the junior employee, Forest Kelley (Exhibit 1 of Complaint; Transcript). Mr. Kelley obviously went to work late in 1961 or early in 1962. After he completed his training or probationary period, he gained departmental seniority on March 12, 1962. March 12, 1962 is his "continuous service date" and this date is posted. After working one year thereafter, March 12, 1963 would be his "anniversary date". When Mr. Kelley was permanently laid off or terminated on September 18, 1966, his last anniversary date was March 12, 1966. Paragraph 51 (c) provides an employee will be entitled to two weeks' vacation pay in the calendar year in which he will complete three years of continuous service and in each calendar year thereafter until he completes nine years of such service.

Mr. Kelley, on March 12, 1966, completed four years of continuous service and in that year, 1966, he worked the required 150 days. As previously stated, Paragraph 51 also was perhaps overlooked by the District Court. However, as that may have been, is not Mr. Kelley entitled to two weeks' vacation within the plain meaning of the con-

tract since he completed the required years and worked the required number of days in 1966?

It is respectfully submitted the claims of the employees are a perfect example of the rationale of the decision in **Re Wil-low Cafeteria,** 111 F. 2d 429 (2nd Cir. 1940), wherein that Court said:

> "The consideration for the contract to pay for a weeks vacation had been furnished, that is to say, one year's service had been rendered prior to June I, so that the week's vacation with pay was completely earned and only the time of receiving it was postponed."

E

History of Lookout Pay Provisions

Prior to 1960, vacations were granted on a continuous service year rather than a calendar year. Any employee with one or more years of continuous service could take their vacation after working the required number of days (then 185 days) by their anniversary date. Most employees could take their vacation from three to five months in advance of their anniversary date depending on the number of years of continuous service. It was perfectly clear that had the wording of contracts prior to 1960 had not been changed all the employees involved herein would have been entitled to the vacation pay sought herein under a provision such as 14.11 (d)[8] (App., p. 97a).

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[8] 14.11 Vacation Period—(d) Employees who may be entitled under paragraph (b) or (c) above to take their vacation in advance of their Anniversary Date shall, if they become disabled or laid off during the three or five month period, whichever is applicable, be entitled upon request to receive their vacation pay at the time of such disability or layoff.

Why was January 1 inserted into the contract? The only evidence of Petitioner before the District Court was the affidavit of Peterson that the Company was having difficulty in administering vacations because the anniversary dates, especially the pre-anniversary dates, of the employees were different. It can be reasonably argued that the Company desired to place all the vacations in the following year, and they were merely postponed for administrative purposes. The Respondent's affiant, F. L. Tate, replied:

> "The purpose of eliminating this Clause was, as Mr. Peterson states, merely to have an uniform time in taking vacations and all vacation periods were merely postponed until after January 1."

The employees have never had more than one vacation in a calendar year, and when the change was made for 1960 and thereafter, it was expressly provided there could only be one vacation in a calendar year. There is not a scintilla of evidence the employees were changing the anniversary date to January 1 as the Company's affiant, Peterson, contended and Petitioner now contends.

By consenting to change the date when vacations could be taken, there is no evidence the employees were giving up the rights they had earned at the bargaining table. This history clearly shows that only the time for taking the vacation was postponed.

The District Court did not consider or at least there was no comment on this relevant past history of the Contract and Negotiations. The Sixth Circuit considered this history along with the language of the contract in question and other factors. The Sixth Circuit found that January 1 was not the "anniversary date" of the employees and the insertion of said date was not a material nature, but one of administrative convenience to Petitioner.

F

Industrial Practice

The Petitioner contends the Sixth Circuit ignored relevant industry's practices and experiences. Petitioner states it closed a number of plants after September, 1959, all of which were subject to the vacation pay provisions contained in the master agreement which in turn were identical to those contained in the Lookout agreement. It states that at each instance, the International did not object.

In one of Respondent's affidavits it was stated Respondent was a completely autonomous self-governing union. That it negotiated its own contracts with the Lookout Company. Respondent had absolutely no knowledge of the contracts in Texas, Massachusetts, New Jersey or any other state. Respondent denied these contracts had identical vacation provisions. Further, Respondent stated it had no knowledge as to how the Company unilaterally administered these contracts as the same was never communicated until after the lawsuit was filed herein (App., pp. 95a, 100a, 101a). The Petitioner did not deny any of these statements. Of course, Respondent could not be bound by contracts in which it did not participate or have any knowledge thereof.

One of the Petitioner's affiants, William C. Campbell, swore the language in the Master's contract, the Texas contract, Iowa contract and Kansas contract were identical (App., pp. 40a, 41a and 42a). The District Court observed in its Memorandum Opinion that "Mr. Campbell avers that the vacation pay clauses being identical to those contained in the Lookout contract were administered exactly the same as in the instant case" (App., p. 81a). Again, the District Court was mislead, or could have

been mislead, as much of the language in those contracts is not identical or reasonably similar.[9]

Respondent in reply in its Petition to Reconsider submitted the arbitrator's decision of Professor Archibald Cox in the case of **Telescope Folding Furniture Co.**, 49 LA 837 (1967), as well as **Statistics on Industrial Practice** as gathered by the Bureau of National Affairs, Inc. Professor Cox emphasized that industrial practice was contrary to that which Petitioner contends.[10] It was specifically pointed out in **Telescope Folding Furniture** for a union to be bound by the practice of its employer, it must participate in such practice.

The District Court did not consider at least there was no comment by the Court on settled industrial practice.

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[9] Paragraph 14.8 (App., p. 47a) of the Master Contract governs vacations during layoffs and disability which is geared to January 1. Paragraph 14.10 (App., p. 49a) covers the situation when an employee quits, is discharged or in the event of death which is also geared to January 1. The Texas contract contains Paragraph 50 (App., p. 48a) similar to 14.10 of the Masters' Contract and Paragraph 52 (58a) similar to 14.10 of the Masters' contract.

* * * * * * * *

The other contracts introduced by Petitioner contained the following clauses. The Massachusetts contract has Paragraph 49 (App. p. 63a) similar to 14.8 of the Masters' contract, and Paragraph 52 (App., p. 65a) similar to 14.10 of the Masters' contract. The New Jersey Contract has Paragraph 7 (App., p. 71a) similar to 14.8 of the Masters' contract, and Paragraph 9 (App., p. 73a) similar to 14.10 of the Masters' contract.

The Lookout Agreement does not have such clauses.

[10] In **Telescope Folding Furniture Co.** at pages 838 and 839, Professor Cox stated:

> "Nevertheless, I must conclude that the particular contract before me was intended to have the meaning given to similar vacation clauses by settled industrial practice, unless there is some evidence of a contrary intention. * * * Here, however the question is governed by the words of the contract and, read in the light of industrial practice, they are unambiguous. * * * In any event, the inferences to be drawn from these clauses are not strong enough to overturn the well-settled principles that prevail in industry generally under this form of vacation agreement."

G

Pro Rata Vacation Not Involved

The District Court was of the opinion Respondent was seeking a pro rata share of the vacation pay (App., pp. 83a, 88a). The Respondent in its pleadings or briefs never made such contention. Respondent took the position at all times the vacation pay was fully earned at the time of the layoff.

The District Court using the common law approach compares the express pro rata provisions for retiring employees and concluded since there was an express provision for retiring employees, the parties did not intend to have pro rata benefits for vacation pay for other employees (App., pp. 88a-90a).

In all due respect to the learned District Court, it is respectfully submitted that it would be impossible to have a pro rata question. A study of the two requirements for vacation pay show one requirement was to work 150 days in a calendar year; the other requirement was to have "one or more continuous years". The latter requirement merely determines the number of weeks of vacation the employee is entitled after working the 150 days.

The only way possible to have had a pro rata question would be had the plant closed when the employees had worked less than 150 days. For example, if the employees had worked just 50 days and were claiming one-third vacation pay, the question would have been involved.

The Company had compulsory retirement at the age of 65 be it whatever quarter of the year when the employee became 65. This provision for retiring employees is based on a pro rata basis of 150 days. That is, 38 days a quarter or roughly one-fourth of the required 150 days. For all other employees, they had to work 150 days to fully earn their vacation pay.

Perhaps the District Court arrived at its conclusion for the reason that Court seemed to be of the opinion the "continuous service year" was the same as a "calendar year". Be that as it may, a pro rata vacation question is not involved and cases cited by Petitioner on the question of pro rata vacations are not in point.

H

Synopsis of District Court Decision

It is respectfully submitted the District Court was first mislead by the affidavits submitted by Petitioner. The District Court did not consider the following relevant factors: 1. The previous negotiations and history of the contract at the Lookout plant, 2. Relevant industrial practice.

On the Petition to Reconsider, the District Court stated it decided the case primarily on the contract language (App., p. 102a). Yet, the District Court did not consider two of the most important defining sections, Paragraphs 49 and 51, to interpret Paragraph 50.

The District Court was of the opinion the Respondent was seeking a pro rata share of the vacation pay. The Respondent never made such contention. Respondent took the position at all times the vacation pay was fully earned at the time of the layoff.

The District Court mentioned several cases of this Court to be used as guidelines. These cases had been suggested to the District Court by Respondent in its original brief. The District Court, instead of following said cases and the governing body of Federal law, turned to State law especially the 1952 Michigan decision of **Treigar v. Steggeman**, 333 Mich. 166, 52 NW 2d 647, and the 1965 Missouri decision of **Brackett v. Easton Boot and Shoe Co.**, 388 SW 2d 842. The Brackett case involved a pro rata question.

THE SIXTH CIRCUIT'S OPINION

The Sixth Circuit immediately recognized governing Federal law which must be followed. The Sixth Circuit cited the decision of Professor Archibald Cox of **Telescope Folding Furniture Co.** (1967), 49 LA 837. This arbitration decision is a complete brief on the subject matter. Professor Cox states the leading case from which labor arbitrators developed their rule was the Second Circuit decision in **Re Willow Cafeteria**, 111 F. 2d 429 (C.A. 2, 1940). The rule followed by labor arbitrators is that vacation pay is deferred wages unless there is a specific contrary intent. Professor Cox at Page 838 emphasized: "The arbitrator cannot ignore the omission of such critical words". The Sixth Circuit observed it had followed **Re Willow Cafeteria** in the following cases. **Smith v. Kingsport Press, Inc.** (1966), 366 F. 2d 416, and in **Hue v. E. I. Dupont deNemours & Co.** (1963), 324 F. 2d 546.

The Sixth Circuit carefully considered the past history of the Lookout contract and commented in detail concerning the same. By citing **Telescope Folding Furniture Co.**, it recognized established industrial practice.

The Sixth Circuit considered and analyzed the various sections of the contract, quoting verbatim Paragraph 49. Based upon all factors, the Sixth Circuit came to a different legal conclusion than the District Court.

The Sixth Circuit after reaching its conclusion that all employees had earned vacation pay, then considered that under a strained interpretation, in view of past bargaining history, its conclusion might not benefit those workers who had not reached their individual anniversary dates. The Court obviously had in mind the 38 employees who had not reached their anniversary dates. Such an employee was Charles Strickland with 32 years of continuous

service whose anniversary date fell on September 20, two days after his termination.

The Sixth Circuit to remove any doubt about these employees relied in part on the general rules of contract law. Whereas, this Court has stated a collective bargaining agreement is not an ordinary contract nor is to be governed by old common law concepts, it is respectfully submitted this Court has never gone so far as to hold that in a novel situation one cannot consider such common law along with all other factors. The Petitioner cannot argue against the equity of the decision of the Sixth Circuit. In essence, the Petitioner seems to ask this Court to reverse because the Sixth Circuit considered ordinary contract law on this one issue. It is respectfully submitted that on occasions, while application of ordinary contract rules should be guarded, nevertheless, they may be useful. It would appear the only alternative on novel issues would be that the Court declare a new concept. In any event, the Sixth Circuit, in addition to general contract law on this issue, relied on decisions of labor arbitrators and in particular, the decision of the labor arbitrator in **Mays Landing Water Power Co.**, 12 LA 1261. The Petitioner cites no authorities to the contrary.

Respondent respectfully submits that even under a strained interpretation of past bargaining, the above issue is never reached. Prior to 1960, the contracts which Petitioner introduced show as in Paragraph 14.11 (supra), that in case of layoff, if the employee was within three to five months of his anniversary date (whicheyer was applicable), he received the vacation pay. The working days required were then 185 days or roughly 9 months of a working day year. Under any of the old contracts, it was not necessary for the employee to reach his anniversary date. As the Respondent's affiant, F. L. Tate stated:

"I agree with the affidavit of Fred A. Peterson that prior to 1959 an employee could take his vacation before the Anniversary Date" (App., p. 96a).

The employees claim the "continuous service year" is merely a provision fixing the number of weeks for various benefits to which an employee was entitled. The same formula was used to determine the number of weeks for disability and retirement benefits. The formula was used for the separation allowance as provided in Paragraph 90-92 (App., pp. 109a, 110a). The Company had no difficulty in determining these continuous service years for separation benefits. There is no difficulty for vacation pay.

Lastly, it should be pointed out the Sixth Circuit did not reject Respondent's further contention that Paragraph 54 (App., p. 107a) is also controlling. The Sixth Circuit did not reach this contention. Paragraph 54 provided the employee, in event of layoff, was entitled to "earned vacation." Paragraph 54 is a peculiar provision which is not contained in any contract submitted by Petitioner. Keeping in mind this paragraph had been in all previous Lookout contracts, wherein the employees could take their vacation within three to five months of their individual anniversary dates, that 185 working days were required; further considering there has always been a special provision for first year employees, one can only ask what was the purpose of Paragraph 54 for those employees with more than one year of continuous service except that a vacation was earned by working the required days?

REASONS FOR DENYING WRIT

The Decision of the Sixth Circuit is Correct

Federal Law

This Court has held one of the primary goals of Federal labor law is the promotion of industrial peace and this goal necessarily requires a uniform body of federal common law to insure certainty in the collective bargaining process. **Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.** (1962), 369 US 95.

Even before the decision in **Lucas Flour Company**, labor arbitrators had turned to the second Court's decision of **Re Wil-low Cafeteria** (supra), to develop a uniform rule. That rule has been followed almost uniformly by labor arbitrators and the lower Federal courts. Typical of a District Court decision prior to the Sixth Circuit's decision in the instant case is that of Chief Judge Freeman of the Eastern District of Michigan in the case of **International Union, U.A.A. & A.I.W. v. Aluminum Alloys Corp.** (1970), 310 F. Supp. 213. In this case, Judge Freeman said:

> "The Court of Appeals for this circuit, considers vacation pay to be deferred wages unless a specific contrary intent is found within the terms of the contract."

The Sixth Circuit in approving the labor arbitration decision of **L. Hyman Co., Inc.**, 13 LA 803, and **Telescope Folding Furniture Co.** (supra), and other arbitration decisions recognized this general rule of labor arbitrators. The case of **L. Hyman Co., Inc.**, was decided by Mr. Robert P. Brecht who at the time held the chair as professor of industry, University of Pennsylvania, an author of well-known and generally accepted books on labor-management

relations. Professor Brecht used the same approach as Professor Cox.

The opposite rule as developed by some State courts in old cases was based on the common law rule, What is the intent of the parties as generally expressed in the language used? This was the approach of the District Court. The District Court did not hesitate to say its decision was based primarily on the language of the contract. The District Court, had it considered all the relevant contract provisions, could have reached the same result as labor arbitrators even under the common law rule. As previously stated, the District Court was of the opinion the Respondent was seeking pro rata vacation pay. Had the District Court applied the rule of labor arbitrators and the lower Federal courts, the District Court decision would necessarily have been just the opposite. In the Lookout contract, there are no critical words which specifically state the employees must be working on January 1.

The Lookout contract provided for voluntary arbitration rather than compulsory arbitration. In view of the decisions of the overwhelming majority of eminent arbitrators, one can only ask, is this not the reason the Petitioner refused to permit this case to go to final arbitration?

As Professor Cox observed in **Telescope Folding Furniture** at Page 840: "It is necessary, however, to have a rule one way or the other." It is respectfully submitted that in the event this Court were to reverse the Sixth Circuit, instead of having industrial peace, only chaos would result.

Tennessee Law

If any State law is to be considered, it is respectfully submitted that only the law of the State of Tennessee should be considered. All Lookout contracts were executed in the State of Tennessee. This Court has stated, State

courts have concurrent jurisdiction but must apply applicable Federal law. Tennessee law may have some significance in view of the fact this Court has stated the contract must be read as a whole and in the light of the law relating it to when made. **Mastro Plastics Corp. v. NLRB**, 350 US 270 (1956). Of course, the Lookout contract was made when Tennessee law had been superseded by Federal law but one might argue that the prior contracts had been made when Tennessee law was applicable.

The Tennessee Supreme Court in 1957 had the exact issue involved herein before it. In regard to contract interpretation, it is infrequent that you have a previous decision almost identical as to controlling facts and contract language. Such is the case of **Textile Workers Union of America v. Brookside Mills** (1957), 203 Tenn. 71, 309 SW 2d 371. In this case, the employees were terminated prior to June 1, 1956, and the Company argued "continuous service" meant the employees must be in the employ of the Company as of June 1, 1956. The pertinent provisions of that contract is perhaps more similar to the one involved in the Lookout contract than any other case cited to this Court by either party. The Brookside Mills contract provided in part as follows:

> "Section 1. All employees who on June 1, 1950, and June 1 of each succeeding contract year, have continuous service with the employer will be paid vacation pay according to the following schedule."

The Tennessee Supreme Court noted it had several authorities submitted to it but did not reveal the authorities. It is respectfully submitted they could have been only those of labor arbitrators. The Tennessee Supreme Court held the contract did not have specific language stating to the effect "all who are employees on June 1", but the contract stated, "all employees who on June 1"; "nor does the contract require that service be continuous up to June

1 or some similar expression." The Tennessee Supreme Court then stated:

> "If, therefore, in the face of this ambiguous language we should hold that an employee who has put in at least 6 months continuous time may be deprived of his vacation pay by being permanently terminated by the employer a few days short of the date of June 1 through no fault of the employee, then we would be reading into the contract a provision for a forfeiture which does not exist."

The Tennessee Supreme Court case is cited in most textbooks as the leading decision on the words, "continuous service." Thus, it is seen that under applicable Federal law, even considering the law of the State of Tennessee, the decision of the Sixth Circuit is correct.

REPLY TO FOUR REASONS ADVANCED BY PETITIONERS TO GRANT THE WRIT

I

Sixth Circuit Decision Is Not in Conflict With the Decision of Any Other Circuit.

Petitioner relies principally on the decision of the Seventh Circuit in the case of **Local Lodge 2040, International Association of Machinists, AFL-CIO v. Servel, Inc.**, 268 F. 2d 692 (7th Cir.), cert. den., 361 U.S. 884 (1959). If Petitioner felt this case was important or even in point, it seems likely it would have called this decision to the attention of the Courts below in its briefs.

In **Local Lodge 2040**, the principal questions before the Seventh Circuit are foreign to the instant case. The Seventh Circuit was not concerned with facts showing an earned or vested right. A vacation claim was briefly discussed toward the end of that decision. The Seventh Circuit merely approved the District Court's holding that no employee was entitled to payment in 1958 because no such person was an employee with seniority on January 1 as specifically required by Section 237 of the agreement. This holding is in accord with the Sixth Circuit decision and that of labor arbitrators.

The other Circuit Court decisions cited involve the right of an employer to terminate its business with the holding that rights not earned or vested do not survive. In the footnote at the bottom of Petitioner's brief, Page 17, in referring to this Court's decision in **Textile Workers Union of America v. Darlington Mfg. Co.**, 380 U.S. 263 (1965), it is stated "this right is, of course, subject to the employer satisfying all obligations which were vested at the time of termination". Respondent agrees with this statement. Petitioner then adds, "As noted, however, we

are not here dealing with vested rights, but, rather, rights which were concededly non-vested". No one has conceded the earned vacation pay involved herein is non-vested as Petitioner contends. It is just to the contrary.

It is quite obvious from reading the decision of the labor arbitrator in the case of **H. K. Porter Co.**, 49 Lab. Arb. 147 (1967), the Sixth Circuit gave great consideration to this decision although it is not specifically referred to in its opinion. This case was decided by Sidney L. Cahn, the former U. S. Commissioner of Labor, Panel Chairman of the War Labor Board and chairman of several presidential fact finding commissions. In **H. K. Porter Co.**, the arbitrator had before him facts very similar to the instant case. Using a typical arbitrator's approach, he held that deferred compensation for services rendered is a "vested right".

Petitioner discusses at length the Second Circuit decision of **Zdanok v. Glidden Co.**, 288 F. 2d 99 (2d Cir.), cert. den. on this issue, 368 U.S. 814 (1961). Petitioner states the decision was so unfavorable, the Second Circuit sitting **en banc** overruled Zdanok in **Local 1251 Int. U. of U.A., A. & A.I.W. v. Robertshaw Controls Co.**, 405 F. 2d 29 (2d Cir. 1968).

In reading the **Robertshaw Controls Co.** decision, the Second Circuit states its first ruling in Zdanok was so unpopular that labor arbitrators would not follow it. In reversing, the Second Circuit relied upon the Sixth Circuit's decision in the case of **Oddie v. Ross Gear and Tool Co.**, 305 F. 2d 143, cert. den. 371 U.S. 941 (1962). The Second Circuit then held in the last complete paragraph of its decision, "If rights are to persist beyond the term of the collective bargaining agreement, the agreement must so provide or be susceptible of such construction". This is exactly what the Sixth Circuit held in the instant case.

II

The Sixth Circuit Used as Guidelines the Decisions of This Court.

The discussion heretofore under the topic, "Sixth Circuit Decision", is a complete answer to Petitioner's argument. As pointed out, the Sixth Circuit considered (1) all the terms of the agreement; (2) the history of the Lookout agreement and past negotiations; (3) established industrial practice; (4) the law as developed by labor arbitrators and the lower Federal courts.

III

Interpretations by State Courts in Old Decisions Do Not Warrant a Review by This Court.

Respondent agrees with Petitioner that this Court has stated one of the primary goals of Federal labor law is the promotion of industrial peace and requires a uniform body of Federal common law. **Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Company,** 369 U.S. 95, 103-104 (1962). Petitioner again restates the Seventh Circuit case of **Local Lodge 2040** (supra). Actually, most of the cases cited by Petitioner are in accord with the law as found by the Sixth Circuit but involve different facts. The Wisconsin decision of **Briggs v. Electric Auto-Lite Company,** 37 Wis. 2d 275, 144 N.W. 2d 32 (1967) and the Missouri decision of **Brackett v. Easton Boot and Shoe Company,** 388 S.W. 2d 842 (1965), are concerned with the issue of "pro rata vacation" which has been previously shown is not herein involved.

In the **Briggs** case, the employees conceded they had not met the terms of the contract by working the required

twelve months but desired a pro rata vacation based upon the months they had worked. The agreement before the Wisconsin Court specifically granted the benefits only "provided employee was in active employ on Dec. 31". The decision is in accord with labor arbitrators and lower Federal courts. In **Brackett v. Easton Boot**, the employees also recognized they had not earned their vacation pay and sought a pro rata portion for the period they had worked. The same pro rata contention was also before the arbitrator in the case of **Hillman Transportation Co.**, 46 Lab. Arb. 509 (1966).

In the 1956 New Jersey case, **Botany Mills v. Textile Workers Union**, 42 N.J. Super. 327, 126 A. 2d 289 (1956), the result would be the same if the rule of labor arbitrators was applied. In the 1956 Ohio case, **International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. L. T. Patterson Co.**, 8 Ohio Op. 2d 334, 159 N.E. 2d 923, aff'd per curiam 159 N.E. 2d 917 (1956), appeal dism'd, 166 Ohio St. 148, 140 N.E. 2d 318 (1957), the same result would occur as the agreement provided no vacation benefits "unless he (the employee) was in the employ of the Company on April 15". A typical approach is used by the labor arbitrator in **Oldberg Manufacturing Co.**, 51 Lab. Arb. 509 (1968) by considering the history of the agreement and the negotiations.

In **Trelor v. Steggeman**, 333 Mich. 166, 52 N.W. 2d 647 (1952), the State court found there was a definite prescribed condition that the employees be working on a certain day. Arbitrators follow this rule under such facts. As Professor Cox stated in **Telescope Folding Furniture Co.**, supra, in regard to the rule followed by arbitrators "only a small minority of the cases are opposed to this conclusion and most of them rest upon peculiar facts". Such are the cases cited by Petitioner.

Petitioner Not Deprived of Due Process of Law.

In Petitioner's footnote, Page 27, Petitioner concedes the issue of Due Process of Law was not raised in the lower courts. It is respectfully submitted for the Court to consider this issue for the first time would be contrary to Rule 23 (1) (f) of this Court.

Petitioner argues that when the case was initially decided, petitioner's affidavits as to the primary purpose of changing the language of the contract was not controverted. This alleged purpose in the affidavits was merely a conclusion of Petitioner, and conclusions are not to be considered on a Motion for Summary Judgment. In Respondent's reply brief in the District Court, the statements of Petitioner were merely referred to as conclusions since Respondent was of the opinion these erroneous conclusions would be noticeably outstanding. In the Petition to Reconsider before the District Court, these conclusions were denied by Respondent's affidavit.

The only possible conclusion that would be permissible would be the one conclusion to which Respondent agreed, which was the Petitioner merely desired to postpone vacations for administrative purposes. Had the contract not been changed for the convenience of the Company, every employee involved herein would clearly be entitled to vacation pay under the wording of the former agreements.

Petitioner has not cited any facts overlooked. The Sixth Circuit simply came to a different legal conclusion based upon the facts than the conclusion of the District Court. It is respectfully submitted that Petitioner had its day in Court.

CONCLUSION

It is evident from the foregoing reasons there is no merit in the Petition for a Writ of Certiorari in this cause. Therefore, it is respectfully prayed that the Writ of Certiorari be denied.

Respectfully submitted

S. DEL FUSTON
522 Maclellan Building
Chattanooga, Tennessee 37402
Telephone: (615)-266-6423
Attorney for Respondent